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IN THE

Supreme Court of the United States

October Term, 1969

No. 1126

UNIVERSAL MARINE CORPORATION, and S.S. "HONG KONG PRODUCER", her engines, etc.,

Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA INC.,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Universal Marine Corp. (Universal) and S.S. "HONG KONG PRODUCER", pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 30, 1969.

Opinions Below

The opinion of the District Court of the United States for the Southern District of New York is officially reported in 297 F.Supp. 984. The majority and dissenting opinions of the Court of Appeals are not yet officially reported, but are unofficially reported in the New York Law Journal, December 11, 1969, Page 1. All of the aforesaid opinions appear in the Appendix hereto (Appendix pp. 4a-38a).

Jurisdiction

The opinions of the judges of the Court of Appeals for the Second Circuit were filed on October 30, 1969. A timely petition for rehearing was denied by an Order entered by that Court on November 18, 1969, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

Questions Presented

1. Whether a deviation by an ocean carrier deprives the carrier of the statutory limitation of liability to cargo provided under the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).

2. Whether a bill of lading provision which permits an ocean carrier to stow cargo on deck unless the shipper informs the carrier under-deck stowage is required, and which is incorporated by reference in the carrier's short form bill of lading issued to the shipper, relieves or lessens the carrier's liability in contravention of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8).

Statutory Provisions Involved

U.S. Code, Title 46:

Section 1304(5):

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been

declared by the shipper before shipment and inserted in the bill of lading. This declaration if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

U. S. Code, Title 46:

Section 1303(8):

"Any clause, covenant, or agreement in a contract or carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

Statement of the Case

It was found by the District Court (Appendix pp. 5a-8a), that:

"1. On December 2, 1964, (Respondent) Encyclopaedia Britannica's agent, United Cargo Corp. ("United Cargo"), delivered to the HONG KONG PRODUCER eight metal containers in which had been placed 4,080 cartons of bound books for carriage to Britannica's affiliate in Japan. The books had been transported from Britannica's Chicago plant by motor truck to New York and there had been consolidated into the metal containers by United Cargo. . . . The shipment was received by (Petitioner) Universal in "apparent good order and condition".

2. On receipt of these metal containers, Universal issued a "short form" bill of lading which contained no notation on its face that any of the containers were to be carried on deck. The short form bill of lading states that:

"This Short Form Bill of Lading is issued for the shipper's convenience and at its request . . .,"

and that:

> "All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein."

The regular form bill of lading provides in part:

> "The shipper represents that the goods covered by this bill of lading need not be stowed under deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.
>
> With respect to goods carried on deck, all risk of loss or damage by peril inherent in or incidental to such carriage shall be borne by the shipper . . ." (Clause 13).

(Respondent) neither notified Universal that it required under-deck stowage nor did it insert in the bill of lading any increased value for the shipment.

3. During transit, the HONG KONG PRODUCER encountered "boisterous" weather, and a considerable amount of sea water passed over its weather decks on numerous occasions. Six of the eight containers were shipped on deck, and, as the parties stipulated, "The aforesaid shipment sustained some damage by breakage and sea water while on board the S/S HONG KONG PRODUCER."

4. The HONG KONG PRODUCER arrived at Yokohama on January 16, 1965. During the next two days, surveyors, at the request of (Universal) or its agent, inspected the cargo aboard the vessel. At several places in the surveyor's report there was noted specific damage to two containers 5152 and 5330. On page 1 of the report, it is said that on both containers "both sides were dented and broken." A similar remark was made on page 2, and the two containers were included in a schedule of damaged cargo with the notation "side broken (about 2′ x 8′)". All

six vans which were stowed on deck were included in this schedule of damaged cargo with the notation "on deck cargo."

5. On January 18, 1965, the cargo was discharged into two barges, and was taken to the warehouse used by (Respondent's) Japanese affiliate in Tokyo. It was transported there by United Cargo and arrived on January 19 or 20, 1965.

6. On January 22, 1965, a joint survey of the cargo was conducted at the warehouse by surveyors representing both parties. The cartons had been removed from the containers prior to survey, apparently by employees or agents of (Respondent). Containers 5152 and 5330 were outside the warehouse and were inspected; the remaining containers were unavailable. Over 1300 cartons were found by the surveyors to have come in contact with water. Four hundred twenty cartons containing Volumes 1-12 of the encyclopedia and two hundred thirty-six cartons containing Volumes 13-24 were found to have sustained extensive damage, and the books therein were unmerchantable. The balance of the cartons which had contacted water sustained only slight damage to the cartons, and no claim has been made as to the books contained therein. Damage to the front and rear doors, the rubber packing, the top plate, the plywood panel and the sides of the two containers was noted.

7. Although there are several weak points in the plaintiff's proof on the question of "causation", I am convinced by the totality of the evidence that the damage sustained to the encyclopedias was caused by the rough seas encountered by the HONG KONG PRODUCER on its voyage."

It was concluded by the District Court (Appendix, p. 8a), that:

> "1. There was no breach of contract or, as articulated by plaintiff's counsel, unreasonable deviations, by the defendant in transporting these books on deck to Japan because the contract of carriage (the bill of lading) provided that the carrier could ship on deck unless notified to the contrary by the shipper or its agent.
>
> 2. The defendant was not negligent in the manner in which it stowed and handled the subject cargo, nor is there any indication that the HONG KONG PRODUCER was unseaworthy at any relevant time. See 46 U.S.C. §§ 1303, 1304 (1936).
>
> 3. Accordingly, I conclude that the defendant is not answerable to the plaintiff for the damage sustained to the cargo during the voyage in question."

The judgment rendered by the District Court in petitioner's favor was reversed by the Court of Appeals (Appendix pp. 13a-34a), with one judge dissenting (Appendix pp. 34a-38a), and the stowing of the six containers on the weather deck was held an unreasonable deviation for which petitioner is liable for the full amount of damages sustained without the benefit of the $500 limitation per package of COGSA, § 4(5), 46 U.S.C. 1304(5).

The stowage on deck was held an unreasonable deviation on the grounds that Clause 13 of petitioner's bill of lading violated COGSA, § 3(8), 46 U.S.C. 1303(8), since by incorporating the carrier's regular form bill of lading by reference in the bill of lading issued, the burden of inquiry was placed on the shipper as to the provisions of the carrier's regular bill of lading (Appendix p. 23a); that the shipper could, by default, lose the right to have its goods stowed under deck (Appendix p. 23a; that the Clause placed the burden of proof showing lack of due diligence or fault on the shipper (Appendix p. 24a); that the provisions of

the "regular" bill of lading were never specifically brought to the shipper's attention (Appendix p. 24a); and that it is impractical to compel the shipper to make a detailed study of the carrier's bill of lading before it ships out a package (Appendix p. 25a); that the bill of lading does not state cargo is being carried on deck but that it may be so carried (Appendix p. 27a); and that petitioner is estopped from invoking Clause 13 since it received the cargo before issuing the bill of lading (Appendix p. 29a).

The Court of Appeals remanded the case to the District Court for a determination of the issue of damages.

The Basis for Federal Jurisdiction in the Court of First Instance

The jurisdiction of the District Court was invoked because of the admiralty and maritime nature of the claim arising out of the carriage of cargo in ocean transit from the United States to Japan.

Reasons for Granting the Writ

1. The decision below conflicts with the decision of the Court of Appeals for the Seventh Circuit as to the proper interpretation of 46 U.S.C. § 1304(5).

The decisions of the Courts of Appeals for the Second and Seventh Circuits are in sharp conflict as to whether a carrier's statutory limitation of liability to cargo applies "in any event," or whether such liability is limited "in any event," except in the case of a "deviation".

A "deviation" consists of "a breach of the contract of carriage," *Farr* v. *Hain Steamship Co.*, 121 F.2d 940, 944 (2nd Circuit, 1941). The conflict between the Circuits arises out of the application of the Carriage of Goods by

Sea Act, 46 U.S.C. § 1304(5), where there is a "deviation" by a carrier. The statute provides, in part:

> "Neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . ." (emphasis added).

The conflict is sharply defined by the acceptance by one Circuit, the Second Circuit in the instant case, and the rejection by the Seventh Circuit, of the reasoning in *Jones* v. *The Flying Clipper*, 116 F.Supp. 386 (S.D.N.Y. 1953), which held an unreasonable deviation deprives the carrier of its statutory limitation of liability. That case was relied on by the Court below, with one judge dissenting, as authority for that proposition:

> "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation . . . The carrier is liable for the full amount of the damages sustained without the benefit of the $500 limitation per package of COGSA. *Jones* v. *The Flying Clipper*, 116 F.Supp. 386 (S.D.N.Y. 1953)." (Appendix p. 33a).

In a prior decision, however, the Court of Appeals for the Seventh Circuit, in *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (CA7C, 1963), affirming that an unreasonable deviation does not deprive the carrier of its statutory limitation of liability, specifically rejected the holding in *Jones* v. *The Flying Clipper*:

> "In Jones, the court reasoned that the doctrine of deviation was so firmly entrenched in maritime law that such a drastic change would have been expressed in clear and unmistakable language. The court found no such language in the Act.
>
> We respectfully disagree with this reasoning and adopt that of the district court in the instant case . . ." *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872, 874 (CA7C, 1963).

Jones v. *The Flying Clipper* involved the on-deck carriage of twenty "packages" containing automobiles and automobile parts for which a clean bill of lading was issued, thereby giving rise to a "deviation". The question considered was whether the deviation deprived the carrier of the benefit of the $500 per package limitation of the Carriage of Goods by Sea Act, 46 U.S.C. 1304(5). The Court rejected the carrier's contention that, according to the language of § 1304(5), the limitation is applicable "in any event", stating, at page 388:

> "The purpose of the $500 limitation in § 1304(5) was to prevent a stipulated value for cargo in a lesser amount and to do away with the then current limits imposed by carriers, usually $100 or even a smaller sum. Except for this change in amount, the provision of the Act did not represent any basic departure from existing law. Neither the Convention nor the Act contains any provision concerning the legal result of an unjustifiable deviation. There is nothing in the history of the Act to indicate that Congress by fixing the limitation at $500 intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. Such a drastic change in the existing law, with its far-reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms."

In rejecting the reasoning of the *Flying Clipper* Case, the Court of Appeals for the Seventh Circuit adopted the reasoning of the District Court:

> "There is no question about the fact that prior to the enactment of the Carriage of Goods by Sea Act, the doctrine of unjustifiable deviation was firmly entrenched in maritime law. This doctrine had developed to circumvent the efforts of carriers to avoid justifiable liability through insertion in shipping contracts and bills of lading of provisions for minimum limitation of liability. It is equally certain that Congress may not be found to have changed existing law without expressing this change in clear and

> unmistakable terms. But it appears to this Court that the language of the statute, if it constitutes a change of existing law, according to the rule applied to other statutes, is sufficiently clear and unmistakable. No amount of interpolation is required to evaluate the weight of the phrases 'in any event' and 'any loss or damage' upon the admonition that 'neither the carrier nor the ship shall in any event be or become liable for any loss or damage * * * unless * * *.'" *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt,* 313 F.2d 872, 874, 875.

The Court of Appeals for the Seventh Circuit went on to note, at page 875:

> "In addition to the reasons stated by the district court, our conclusion finds support in the fact that the package limitation immediately follows § 4(4) of the Act, 46 U.S.C.A. § 1304(4) in which Congress, as we have already stated, recognized the carrier's liability for unreasonable deviations. It is difficult for us to believe that Congress did not intend this limitation to apply to the Section next preceding it."

In like manner, the dissenting opinion below in the present case accepted the Seventh Circuit case as controlling authority, stating at page 280:

> "In any event, the shipper's recovery should be limited to $500 per package pursuant to Section 4(5) of COGSA (46 U.S.C. §1304[5] [1964]). Atlantic Mutual Insurance Co. v. Poseiden Schiffahrt G.m.b.H., 313 F. 2d 872 (7th Cir.), cert. denied, 375 U.S. 819 (1963). By its express terms, that section applies 'in any event.'
>
> Perhaps if the stowage of the cargo on deck had constituted a breach of the contract of carriage, its provisions would be inapplicable. But it seems highly unlikely that without including some more specific statutory direction the draftsman of COGSA intended that a breach of contract should relieve the carrier and the shipper of their rights and duties under the Act. The provisions of COGSA apply independently of any contract. See Benefict, 1 The

> Law of American Admiralty 291 n. 35 (Knauth ed. 1940). Indeed, it is generally accepted that COGSA modified the doctrine of deviation in maritime law at least to the extent that insurer's liability attaches only when the damage is causally related to the unreasonable deviation. See Searoad Shipping Co. v. E. I. du Pont de Nemours and Co. Inc., 361 F. 2d 833, 835-36 (5th Cir.), cert. denied, 385 U.S. 973 (1966); Gilmore and Black, The Law of Admiralty §§3-40 and 3-41 (1957). It is difficult to understand how the majority opinion can take the position that it is so important to protect an experienced shipper from losing the benefits of COGSA by agreeing to on deck stowage and yet can adopt the view that a breach of the contract of carriage nullifies the carefully balanced provisions of the Act."

The propriety of granting a writ of certiorari is apparent. There is a square and irreconcilable conflict between Courts of Appeals, *Avco Corp.* v. *Aero Lodge* 735, 390 U.S. 557, 559, (1968), *Northeastern National Bank* v. *United States*, 387 U.S. 213, 217, (1967), and the conflict "involves an important question of statutory construction," *Shapiro* v. *United States*, 335 U.S. 1, 4, (1948).

The importance of the issue in conflict is of considerable importance in the maritime industry, and has a direct bearing in the day to day operations of ocean carriers. *New York* v. *Saper*, 336 U.S. 328, 329, (1949). There is an obvious "need for a uniform rule on the point," *Commissioner* v. *Bilder*, 369 U.S. 499, 501 (1962), as evidenced by the fact "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues," *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 237, (1964).

2. The reasons stated by the Court below that the bill of lading provision permitting on deck stowage violates the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), are based on propositions in direct conflict with the decisions of other Courts of Appeal.

The Court below concluded that Clause 13 of the carrier's regular bill of lading, which permitted the carrier a conditional option to stow cargo on deck, and which was incorporated by reference in the "short-form" bill of lading issued to the shipper, relieved or lessened the carrier's liability in contravention of the Carriage of Goods by Sea Act, § 1303(8).

The stated reasons upon which the conclusion is reached are in conflict with the decisions of other Courts of Appeal.

The Court stated, as a reason, that petitioner is estopped from invoking Clause 13 since it received the cargo before issuing the bill of lading, (Appendix p. 29a). In *American Mills* v. *Luckenbach S.S. Co.*, 24 F.2d 704 (Fifth Circuit, 1928), the Court stated at page 705:

> "Appellee is presumed to know the law, and therefore must have known that the terms and conditions on which its goods were received and would be transported would be contained in a bill of lading to be issued later. In the circumstances, it cannot be inferred that it was the intention of the parties to enter into a contract that would bind the carrier as insurer; but *an implied understanding arose from common business experience that the carrier would issue such bill of lading as it was its custom to issue to shippers in the usual course of its business.* The Caledonia (C.C.) 43 F. 681, 685; s.c., 157 U.S. 124, 139, 15 S. Ct. 537, 39 L. Ed. 644.
>
> Appellant's bill of lading was issued after the fire, but it was in accordance with its standard form, issued to all shippers alike, and was not made to fit a special case, in order to escape a liability that had already accrued. It, therefore, but evidenced the

> contract the parties entered into at the time the goods were delivered and accepted. In the ordinary case of a shipment of goods, it is not to be assumed, upon proof of delivery without condition, that the carrier intends to become insurer; but *a shipper, in the absence of a special contract, must be presumed to deliver his goods on the terms and conditions usually and customarily imposed by the carrier in the regular course of business.*" (emphasis added).

The Court below stated, as a reason, that the incorporation in the carrier's short form bill of lading of its regular form bill of lading by reference placed the burden of inquiry on the shipper as to the provisions of the carrier's regular bill of lading (Appendix p. 23a). In *Bank of California* v. *International Mercantile M. Co.* (2nd Circuit, 1933), 64 F.2d 97, 290 U.S. 649 the Court, in considering a similar type bill of lading provision, stated at page 98:

> "These clauses had the effect of incorporating in the contract of carriage the appellant's ocean bill of lading by reference."

The Court below stated, as a reason, that the shipper could, by default, lose the right to have its goods stowed under deck (Appendix p. 23a), and that the bill of lading does not state cargo is being carried on deck, but that it may be so carried (Appendix p. 27a). In *Davidson* v. *Flood Bros., et al.* (9th Cir. 1929), 30 F.2d 279, 279 U.S. 883, the Court, in holding it was not negligence *per se* to carry cargo on deck, instead of under deck, stated at page 280:

> "On deck stowage was pursuant to a clause in the bills of lading granting appellees 'liberty to carry the goods and any other goods on deck or under deck.'"

The Court below stated, as a reason, that the provisions of the "regular" bill of lading were never specifically brought to the shipper's attention (Appendix p. 24a), and that it is impractical to compel the shipper to make a

detailed study of the carrier's bill of lading before it ships out a package (Appendix p. 25a). In *Bank of California* v. *International Mercantile M. Co.* (*supra*), the Court stated at page 98:

> "The shipper could have requested and obtained knowledge as to its terms if it so required; having failed to do so, it is bound by the reasonable clauses therein contained."

As is apparent from the foregoing, the Court below, in concluding that Clause 13 of petitioner's bill of lading violated the provisions of the U. S. Carriage of Goods by Sea Act, stated propositions in conflict with long accepted principles of maritime law relating to the carriage of cargo, as enunciated in the opinions of other Courts of Appeals.

The majority of the Court below cites virtually no authorities in support of the propositions set forth by it, and as opposed to this, the dissenting opinion, sets forth, point by point, authorities in conflict with the holding of the majority.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Appendix A

(Opinion of the District Court on Plaintiff's Motion for Summary Judgment)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Ad. 910

———o———

ENCYCLOPAEDIA BRITANNICA, INC.,

Plaintiff,

v.

S.S. "HONG KONG PRODUCER," her engines, etc.,

v.

UNIVERSAL MARINE CORPORATION,

Defendant.

———o———

CROAKE, *D. J.*

MEMORANDUM

Plaintiff, Encyclodaedia Britannica, Inc. (BRITTANICA), moves for partial summary judgment under Rule 56, Fed. R. Civ. P. BRITANNICA, claiming that no factual issues are present, asks this court to make determinations on several questions of law. Examination of the moving papers shows that there are factual matters in dispute.

The present action arose out of a shipment of eight containers said to contain volumes of the Encyclopaedia Britannica on the S.S. "HONG KONG PRODUCER." Six of the eight containers in question were shipped on the deck of the ship rather than in the hold. A "clean" bill of lading

was issued for all eight of the containers. In transit, rough seas were encountered and two of the six on deck containers were damaged.

The carrier, among other defenses, has pleaded that the bill of lading is subject to the United States Carriage of Goods Act, 46 U.S.C. § 1300, et seq. (1964) (COGSA), and particularly § 4(5) COGSA, 46 U.S.C. § 1304(5) (1964), which places a $500 per package limitation on the carrier's liability. Britannica claims that the issuance of a "clean" bill of lading implies under deck stowage. See *St. Johns N.F. Shipping Co.* v. *S. A. Companhia Geral Commercial Do Rio de Janerio*, 263 U.S. 119 (1923); *Seaboard Shipping Co.* v. *Du Pont de Nemours Co.*, 361 F. 2d 833 (5th Cir. 1966). Therefore, failure to ship below deck as required by the "clean" bill of lading was an unreasonable deviation from the agreement to ship and the $500 limitation provided by statute is inapplicable. Compare *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953), with *Atlantic Mutual Ins. Co.* v. *Poseidon Schiffahrt*, 313 F. 2d 872 (7th Cir. 1963). BRITANNICA also argues that the containers were not packages within the meaning of § 4(5) COGSA, 46 U.S.C. § 1304(5) (1964).

The defendant argues that while a "clean" bill of lading usually implies under deck stowage, it has been the custom of container carriers to ship goods in containers on the deck under a "clean" bill of lading and that the plaintiff was aware of this fact.

This court recognizes that there has been an increase in the use of containers in the shipping industry. The United States Supreme Court in construing the meaning of the term "clean" bill of lading has indicated that a general port custom permitting above deck stowage could modify the meaning of a "clean" bill. See *St. Johns N. F. Shipping Co.* v. *S. A. Compania Geral Commercial Do Rio de Janerio, supra*, at 124. Because of the growth in this

type of shipping arrangement and the importance of the questions presented to the shipping industry, we do not believe that justice would be served if we attempted to decide questions concerning custom in the industry on the present affidavits or without a full evidentiary proceeding. Neither do we feel that justice will be served by piecemeal legal determinations in this matter. See *Boston & Maine R.R.* v. *Lehigh & New England R.R. Co.*, 188 F. Supp. 487, 491 (S.D.N.Y. 1960). The particular factual and legal questions should be determined at trial.

In accordance with the foregoing, the motion for summary judgment is denied.

So Ordered.

Dated: New York, N. Y.
November 29, 1967

THOMAS F. CROAKE
U. S. D. J.

Appendix B

(Opinion of the District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
65 Ad. 910

———o———

ENCYCLOPAEDIA BRITANNICA, INC.,

Plaintiff,

against

SS HONG KONG PRODUCER, her engines, etc.,

and against

UNIVERSAL MARINE CORPORATION,

Defendant.

———o———

BIGHAM, ENGLAR, JONES & HOUSTON, New York, New York, by F. HERBERT PREM, Esq., Attorneys for Plaintiff.

MENDES & MOUNT, New York, New York, by JOHN J. SULLIVAN, Esq., Attorneys for Defendant.

TYLER, *D. J.*

This suit arises out of a shipment of books by plaintiff Encyclopaedia Britannica, Inc. ("Britannica") on the SS HONG KONG PRODUCER, which is owned by defendant Universal Marine Corporation ("Universal"). A trial was held before the court sitting without a jury on January 15 and 16, 1969. The following findings of fact and conclusions of law represent my decision on the merits of this controversy.

Appendix B

(Findings of Fact)

1. On December 2, 1964, Britannica's agent, United Cargo Corp. ("United Cargo"), delivered to the Hong Kong Producer eight metal containers in which had been placed 4,080 cartons of bound books for carriage to Britannica's affiliate in Japan. The books had been transported from Britannica's Chicago plant by motor truck to New York and there had been consolidated into the metal containers by United Cargo. The containers bore the following identification numbers: UCC 5120, UCC 5152, UCC 5223, UCC 5298, UCC 5330, UCC 5458, UCC 5496, and C-10344.[1] The shipment was received by defendant Universal in "apparent good order and condition" (Exhibit 5).

2. On receipt of these metal containers, Universal issued a "short form" bill of lading which contained no notation on its face that any of the containers were to be carried on deck. The short form bill of lading (see Exhibit 5) states that:

> "This Short Form Bill of Lading is issued for the shipper's convenience and at its request . . .",

and that:

> "All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein."

The regular form bill of lading (see Exhibit 5) provides in part:

> "The shipper represents that the goods covered by this bill of lading need not be stowed under deck

[1] The first seven of these containers were 17′ x 8′ x 8′. The eighth, described as a "pallet container", was evidently smaller than the others.

and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.

With respect to goods carried on deck, all risk of loss or damage by peril inherent in or incidental to such carriage shall be borne by the shipper. . .".

Britannica neither notified Universal that it required under-deck stowage nor did it insert in the bill of lading any increased value for the shipment.

3. During transit, the HONG KONG PRODUCER encountered "boisterous" weather, and a considerable amount of seawater passed over its weather decks on numerous occasions. Six of the eight containers were shipped on deck, and, as the parties stipulated, "The aforesaid shipment sustained some damage by breakage and sea water while on board the SS HONG KONG PRODUCER."

4. The HONG KONG PRODUCER arrived at Yokohama on January 16, 1965. During the next two days, surveyors, at the request of defendant or its agent, inspected the cargo aboard the vessel. At several places in the surveyor's report (Exhibit 7), there was noted specific damage to containers 5152 and 5330. On page 1 of the report, it is said that on both containers "both sides were dented and broken." A similar remark was made on page 2, and the two containers were included in a schedule of damaged cargo with the notation "side broken, (about 2′ x 8′)". All six vans which were stowed on deck were included in this schedule of damaged cargo with the notation "on deck cargo."

5. On January 18, 1965, the subject cargo was discharged into two barges (see Exhibits 3A and 3B), and was

taken to the warehouse used by Britannica's Japanese affiliate in Tokyo. It was transported there by United Cargo and arrived on January 19 or 20, 1965.

6. On January 22, 1965, a joint survey of the cargo was conducted at the warehouse by surveyors representing both parties. (Exhibits 4 and C.) The cartons had been removed from the containers prior to survey, apparently by employees or agents of Britannica. Containers 5152 and 5330 were outside the warehouse and were inspected; the remaining containers were unavailable. Over 1300 cartons were found by the surveyors to have come in contact with water. Four hundred twenty cartons containing Volumes 1-12 of the encyclopaedia and two hundred thirty-six cartons containing Volumes 13-24 were found to have sustained extensive damage, and the books therein were unmerchantable. The balance of the cartons which had contacted water sustained only slight damage to the cartons, and no claim has been made as to the books contained therein. Damage to the front and rear doors, the rubber packing, the top plate, the plywood panel and the sides of the two containers was noted.

7. Although there are several weak points in the plaintiff's proof on the question of "causation",[2] I am convinced by the totality of the evidence that the damage sustained

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[2] The proof is very thin on the condition of the books themselves when received by defendant. Cf. *Koyo International Inc.* v. *S.S. Ootmarsum*, 234 F. Supp. 424, 425 (S.D.N.Y. 1964); *Copco Steel & Engineering Co.* v. *S.S. Alwaki*, 131 F. Supp. 332, 333 (S.D.N.Y. 1955). Also, there is no indication in the record as to precisely what happened to the books between the time they left the ship and the time they were inspected, a period of some three days. The books were removed from the containers by plaintiff's employees or agents so that the precise containers from which the extensively damaged books were taken cannot be ascertained.

to the encyclopaedias was caused by the rough seas encountered by the HONG KONG PRODUCER on its voyage.

CONCLUSIONS OF LAW

1. There was no breach of contract or, as articulated by plaintiff's counsel, "unreasonable deviation", by the defendant in transporting these books on deck to Japan because the contract of carriage (the bill of lading) provided that the carrier could ship on deck unless notified to the contrary by the shipper or its agent.

2. The defendant was not negligent in the manner in which it stowed and handled the subject cargo, nor is there any indication that the HONG KONG PRODUCER was unseaworthy at any relevant time. See 46 U.S.C. §§ 1303, 1304 (1936).

3. Accordingly, I conclude that the defendant is not answerable to the plaintiff for the damage sustained to the cargo during the voyage in question.

THE BREACH OF CONTRACT ISSUE

Plaintiff's contention on the issue of liability is relatively clear. It claims that the defendant shipped its goods on deck notwithstanding its contract and contrary to the custom, and that the goods were damaged as a result of on-deck stowage. The pivotal issue of law in this case is whether there has been a breach of contract during the voyage by reason of defendant's on-deck stowage of the six metal containers. In fairness to the plaintiff, which has relied exclusively on this argument to establish liability, I will discuss this issue at some length.

Appendix B

Despite the understandable incursions of public law into admiralty cases involving contracts for the carriage of goods by sea, the basic legal relationship between shipper and carrier is one of private contract. Thus, it is not surprising that admiralty courts have come to recognize that certain fundamental breaches of performance by a carrier, frequently styled "unreasonable deviations", give rise to liability of the carrier for damage to the goods.[3] See Gilmore & Black, *Admiralty,* 156 (1957). A good example of such a breach or deviation occurs when the ship makes a substantial geographical departure from its scheduled route. See Gilmore & Black, *supra,* at 156-58.

A related doctrine has emerged that if the parties contracted for under-deck stowage but the carrier shipped the cargo on a weather deck, liability for damage to the cargo will be imposed upon the carrier, at least for any damage causally related to shipment on deck.[4] See Gilmore & Black, *supra,* at 161-62. This doctrine is based upon the proposition that on-deck shipments incur substantially greater risks than do below deck shipments.

Apparently it has been a long-standing custom in most ports in this country that a "clean" bill of lading, i.e. one that makes no mention of on-deck stowage, connotes under-

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[3] For various reasons not important here, admiralty courts have even imposed an insurer's liability in these cases, i.e. the damage need not have been caused by the "unreasonable deviation."

[4] In virtually all the cases concerning this type of breach of the shipping contract, the damage has been causally related to on-deck shipment. To my knowledge, none of the cases specifically hold that such a causal relationship is necessary, and some of the cases describe the breach as "unreasonable deviation." See *Jones* v. *The Flying Clipper,* 116 F. Supp. 386, 387 (S.D.N.Y. 1953). In any event, as heretofore indicated, I have expressly found that weather deck stowage of two of the containers contributed to their damage.

deck stowage of general cargo.[5] See *Searoad Shipping Co.* v. *E. I. duPont du Nemours & Co.*, 361 F.2d 833, 835 (5th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Jones* v. *The Flying Clipper*, 116 F. Supp. 386, 387-88 (S.D.N.Y. 1953). Thus, where the parties have made no mention of this element of their contract, failure by the carrier to stow general cargo below deck has been regarded as a breach or deviation, this term of the contract being supplied by custom.

The reason that this latter rule has no application to this case is simple: the bill of lading specifically addresses itself to the question of on-deck stowage, stating that "... it is agreed that it is proper to and they [the goods] may be stowed on deck . . .". *Givaudan Delawanna* v. *The Blijdendijk*, 91 F. Supp. 663 (S.D.N.Y. 1950), and cases cited therein.

Here, as in *Givaudan Delawanna*, the plaintiff seems to be confused about the meaning of the term "clean bill of lading." In my opinion, Judge Kaufman there correctly stated the law in this area, and I agree with his conclusion, which follows:

> "Considerable difficulty has been occasioned by the use of the term 'clean' bill of lading, due in all probability to the fact that the term has two mean-

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[5] My reasoning does not require me to consider the effect here, if any, of the fact that the cargo was loaded and sealed in metal containers by United Cargo before it was delivered to defendant's ship. However, I note in passing that containerization has already posed difficult questions for admiralty courts, see, *e.g. Standard Electrica S.A.* v. *Hamburg Sudamerikanische Dampfachiffahrts-Gesellschaft*, 375 F. 2d 943 (2d Cir. 1967), and one can be fairly certain that changes in the custom and usage of the industry will have some effect on the law in this area.

Indeed, if a finding on this issue were required in this case, I would tend to the view that defendant, through its witnesses Rand and Sember, established that in recent years there has been a growing practice of stowage of containerized cargo on weather decks of container ships and general cargo vessels.

> ings, one broad and one narrow. Broadly speaking, a 'clean' bill of lading is one which contains nothing written, stamped or printed in the margin qualifying the words of the bill of lading itself. * * * In the narrower sense, where a bill of lading with no qualifying words in the margin and with no provision in the bill of lading itself as to the manner of stowage is used, the import of such 'clean' bill of lading is that goods are to be secured under deck. * * *
>
> It is conceded that the bill of lading issued in this case was 'clean' in the broader sense, that is, nothing was printed or noted in the margin. However, libelant seeks to make the broader usage of a 'clean' bill of lading synonymous with its narrower usage and thereby establish that under deck stowage was implied by this bill of lading; and therefore it concludes that the clause permitting on deck stowage was invalid.
>
> A 'clean' bill of lading cannot import under deck stowage except in the absence of a specific provision as to stowage." [Citations omitted.] 91 F. Supp. at 665.

One final argument made by plaintiff must be considered. Britannica points to the fact that the regular form bill of lading containing the applicable contract term was incorporated by reference into the so-called "short form", and to the fact that the print on the long form bill of lading was fine. It then argues that it should not be held to have agreed to this clause, apparently because neither its employees nor its agents read the regular form bill of lading.[6] If this

[6] It has been held that an innocent purchaser for value of a bill of lading takes with notice of the provisions of the bill. *Givaudan Delawanna* v. *The Blijdendijk*, 91 F. Supp. 663, 666 (S.D.N.Y. 1950). It would seem that *a fortiori* the shipper must be held to such notice.

were an occasional and inexperienced shipper dealing directly with the carrier, such an argument might engender at least sympathetic consideration. But Britannica was and is no "babe" in the shipping "woods". It engaged an experienced shipping agent, United Cargo, to make final arrangements for passage to Japan. United Cargo deals with carriers, including the defendant, on a daily basis. It should be well acquainted with the provisions of the bills of lading used by the carriers. I think it is entirely proper to hold Britannica to the terms of the bill of lading, especially since it could have assured below deck stowage by merely notifying the defendant that such was required.

Decree or judgment for defendant.

Dated: New York, N. Y.
March 21, 1969

H. R. Tyler, Jr.,
U.S.D.J.

Appendix C

(Opinion of the Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 10—September Term, 1969

(Argued September 15, 1969 Decided October 30, 1969)

Docket No. 33495

ENCYCLOPAEDIA BRITANNICA, INC.,

Plaintiff-Appellant,

v.

SS "HONG KONG PRODUCER," her engines, etc., and UNIVERSAL MARINE CORPORATION,

Defendant-Appellee.

Before:

MOORE, HAYS and ANDERSON,

Circuit Judges.

Appeal by shipper from judgment by United States District Court, Southern District of New York, Harold R. Tyler, Jr., *Judge,* holding carrier not liable for damage to cargo by sea water. Reversed and remanded.

F. HERBERT PREM, Esq., New York, N. Y. (Bigham, Englar, Jones & Houston, New York, N. Y., on the brief), *for Appellant.*

Appendix C

JOHN J. SULLIVAN, Esq., New York, N. Y. (Mendes & Mount, New York, N. Y., on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

This case concerns a claim for damage by breakage and sea water to approximately 1300 cartons of encyclopedias shipped by the appellant, Britannica, from New York to its affiliate in Yokohama, Japan. The damaged cartons were a part of a shipment of 4080 cartons of books, sent by appellant from its Chicago plant to its agent in New York, United Cargo Corp., which packed the cartons into seven separately numbered, metal containers, 17′ x 8′ x 8′, and one smaller metal pallet container, also numbered. On December 2, 1964 United delivered the containers to S.S. Hong Kong Producer, owned and operated by appellee, Universal Marine Corporation, which received the shipment on board in "apparent good order and condition" and issued a "short form" bill of lading. Unknown to Britannica and United only two of the containers were stowed below deck while six were stowed on the weather deck. The short form bill in itself contained no notice or statement that the containers were to be carried as deck cargo or that they might be so carried, but it incorporated by reference [1] all

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[1] The provisions of the short form bill are as follows:

"Received the goods, or packages, said to contain goods herein mentioned, in apparent good order and condition unless otherwise indicated, to be transported and delivered or transhipped as herein provided.

This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have effect subject to the provisions of the U. S. Carriage of Goods by Sea Act, 1936, or of the Carriage of Goods by Sea or similar Act in force in the locality where this Bill of Lading is issued, so far as they may be applicable.

of the terms of the carrier's regular form bill of lading. Of this regular form the portion which is at the center of the controversy in this case, is Clause 13, of which Britannica claims to have been wholly unaware but which reads, in full, as follows:

> "13. STOWAGE ON DECK, ETC.—Goods stowed in poop, forecastle, deckhouse, shelter deck, passenger space, storeroom, bunker space, or any other covered-in space shall be deemed to be stowed under deck for all purposes, including General Average.
>
> The shipper represents that the goods covered by this bill of lading need not be stowed under deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.
>
> With respect to goods carried on deck, all risk of loss or damage by perils inherent in or to incidental [sic] such carriage shall be borne by the shipper and the carrier shall have the benefit of all the terms of this bill of lading not inconsistent with the provisions

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All the terms of the carrier's regular form of Bill of Lading are incorporated herein with like force and effect as if they were written at length herein. A copy of such Bill of Lading may be obtained from the carrier, its agents or the master.

All agreements or freight engagements for shipment of goods are superseded by this Bill of Lading and all its terms, whether written, typed, stamped or printed, or incorporated by reference are agreed by the shipper to be binding and to govern the relations, whatever they may be, between those included in the words 'shipper' and 'carrier' as defined in the carrier's regular form of Bill of Lading. One signed Bill of Lading, duly endorsed, will be surrendered, if requested, to the agent of the vessel at port of discharge in exchange for delivery order."

of this clause and shall have the benefit of all and the same rights, immunities, exemptions, and limitations as provided for in Act 4 of the Hague rules or the corresponding provision of any Act that may be applicable, excepting subdivisions (1), (2)(j), (2)(q), (3) and (4) thereof. In no event shall the carrier be liable for any loss or damage to goods so carried on deck arising or resulting from any cause whatsoever, including unseaworthiness, unless affirmatively proved to be due to lack of due diligence or to the fault or the neglect of the carrier or those for whom it may otherwise be responsible, but the carrier shall not in any event be liable for any act, neglect or default in the navigation or the management of the ship."

Universal delivered the original short form bill of lading, duly signed by its agent, but no copy of the long form bill was attached to or issued with it, though the short form stated where the regular form could be obtained. Neither the shipper nor its agent asked for one. The short form bill was issued *after* the delivery of the containers to Universal, and there was no opportunity for Britannica or United to inform Universal "in writing *before* the delivery of the goods to the carrier" that the containers should be stowed under deck. There was no evidence of any oral understanding or agreement by the parties regarding on deck stowage nor was there any evidence of notice by Universal to the appellant prior to the receiving of the containers on board that Universal had the option under Clause 13 to stow the containers above deck, nor was there any evidence that the appellant had any actual notice or knowledge that above deck stowage might be made. Moreover, there was no proof that the appellant had ever had any past dealings with Universal although United had dealt with Orient Lines. There was no evidence that either Britannica or United had previously been issued a bill of

lading containing Clause 13 nor does it appear when Universal adopted and began using that clause in its regular long form bill of lading. The goods were loaded and stowed on December 2, 1964 at 1300, and the ship departed the Port of New York at 2230 of the same day.

In the course of its winter crossing of the Pacific the Hong Kong Producer ran into what was described as "boisterous" weather. The abstract from the ship's log showed two days, January 11 and 12, 1965, when the wind velocity reached force 7-8 (28-40 knots) on the Beaufort scale and one day, January 13, when it reached 8-9 (34-47 knots), but it made no references to the condition of the sea nor any record of damage to the ship. The trial court found that "a considerable amount of sea-water passed over its weather decks on numerous occasions." The parties stipulated, and the court also found, that the shipment sustained some damage by breakage and sea water. The appellee's surveyors, on arrival at Yokohama, reported specific damage to two of the containers. The findings below state that over 1300 cartons had come in contact with sea water. Of these, 420 cartons containing volumes 1-12 of the encyclopedia and 236 cartons containing volumes 13-24, had sustained damage so extensive that the books were unmerchantable. The remaining volumes were only slightly damaged, and no claim has been made with regard to them. The two containers were also found to have been damaged.

The central issue of this case, as the trial court noted, is Britannica's claim that Universal issued to it what appeared to be a clean bill of lading which imported below deck stowage, and that Universal deviated therefrom by stowing six of the containers on deck. The district court held, in support of Universal's contention, that it did not issue a clean bill because Clause 13 of the bill of lading itself "specifically addresses itself to the question of on-

deck stowage, stating that '. . . it is agreed it is proper to and they [the goods] may be stowed on deck. . . .'" Under the terms of Clause 13 the carrier had the option to stow the containers above or below decks, unless the shipper notified it in writing, before delivery of the goods to the carrier, that under deck stowage was required. The district court concluded that the issue was a simple matter of contract; the shipper did not give written notice to the carrier that under deck stowage was required and, therefore, the carrier had the right to stow the goods on deck if it elected to do so.

We do not view this case as one of simple contract between completely free contracting parties. Universal is a common carrier and its legal relations may be affected by public interest. Congress has recognized this, with regard to shipment of cargoes out of the ports of this country in ocean going vessels, through enactment of The Harter Act, 46 U.S.C. § 190 et seq., and the Carriage of Goods By Sea Act (COGSA), 46 U.S.C. § 1301 et seq.

During the century or so preceding COGSA the laws governing liability for loss of or damage to ship-borne cargoes, which occurred in the course of their shipment overseas to foreign ports ran through wide swinging extremes from almost absolute responsibility of the carrier under the general maritime law to almost absolute immunity from such liability when the carriers, exercising their vastly superior bargaining powers, compelled shippers to submit to the insertion of innumerable, all embracing exceptions to liability in bills of lading which the carriers drafted. The courts of this country took steps to redress the balance by declaring some of these exceptions invalid. In some other countries, notably England, the courts upheld the exceptions. In 1893 by enacting The Harter Act, Congress sought to provide a statutory solution which would be fair to the competing interests. The Hague Rules, which

leaned heavily on The Harter Act, were promulgated in 1921 and amended by the Brussels Convention in 1924, under the sponsorship of maritime nations and representatives of ocean shipping, to provide a set of uniform provisions for ocean bills of lading. This country joined the Brussels convention in 1936, and, to make its adherence effective, passed COGSA which duplicates the Hague Rules practically word for word.

The purposes behind Harter, the Hague Rules and COGSA were to achieve a fair balancing of the interests of the carrier, on the one hand, and the shipper, on the other, and also to effectuate a standard and uniform set of provisions for ocean bills of lading. In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959), the Supreme Court, speaking of the history of COGSA said:

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233.[5] The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade."

See *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F.2d 603 (2 Cir.) *cert. denied* 329 U.S. 774 (1946); *Scarburgh* v. *Compania Sud-Americana de Vapores*, 174 F.2d 423, 424 (2 Cir. 1946); *Standard Electrica, S. A.* v. *Hamburg Sudamerikanische, etc.*, 375 F.2d 943 (2 Cir.), *cert. denied* 389 U.S. 831 (1967).

In anticipation of persistent efforts by carriers, who are the drafters of ocean bills of lading, to limit or eliminate

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[5] "The Hague Rules as amended by the Brussels Convention were, in turn, based in part upon the pioneering Harter Act of 1893, 27 Stat. 445, 46 U.S.C. §§190-196. See H. R. Rep. No. 2218, 74th Cong., 2d Sess. 7."

their own duties and responsibilities under the Act by inserting exceptions into the foot long, double columns of well nigh indecipherable fine print, various exceptions to their possible liabilities, COGSA included a self-protective provision, § 1303(8), which prohibited the inclusion of clauses which relieve the carrier or ship from liability for loss or damage to goods arising from negligence, fault or failure in fulfilling obligations specified in other portions of the section or lessening such liabilities.[2]

This is not to say that the parties to a bill of lading are forbidden by COGSA to agree upon exceptions outside of the provisions of the Act. As stated in Gilmore & Black, *Admiralty*, § 3-25 at 125 (1957):

> "Cogsa allows a freedom of contracting out of its terms, but only in the direction of *increasing* the shipowner's liabilities, and never in the direction of diminishing them." (Footnote omitted.)

See also COGSA § 1306, which is, however, not applicable to the present case.

In spite of the clear intent and purpose of COGSA, some carriers sought by various means to insert into their bills of lading provisions which would give them an added advantage or lessen their liabilities. These were not, however, necessarily arbitrary or lacking in equities. One

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[2] 46 U.S.C. §1303(8) provides:

> "(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

provision known as the "Both-to Blame Clause" was put in practically all ocean bills of lading after COGSA. It applied where there was a collision between two ships both of which were at fault and cargo was lost or damaged. If a recovery was made by the cargo against the non-carrying ship, the effect of the provision was to require that the amount recovered be paid over to the carrying vessel. This was considered an indemnification of the carrying ship for what it had to pay to the non-carrying ship by reason of the cargo damage, though COGSA had relieved the carrying ship of any liability for damage to its cargo because of negligent operation of the ship. The Supreme Court, however, struck down the clause as a violation of § 1303(8). *United States* v. *Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1952).[3]

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[3] The decision affirmed the holding of this court in the case, before us sub nom. *United States* v. *Farr Sugar Corp.*, 191 F.2d 370 (2d Cir. 1951). A portion of the opinion is set forth at length in Gilmore & Black, *Admiralty*, § 3-39, note 106 at 155 (1957). It is repeated here because in its broader aspect it bears on the simple contract approach to the issue of the validity of Clause 13 in the case now before us. While there is no evidence that use of this clause is common or wide-spread in bills of lading, it would speedily be adopted, if it were held to be valid, because of the enormous advantage it gives the carriers. The quoted portion is 191 F.2d at 374 and reads as follows:

> "The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand."

Appendix C

Some carriers also sought to get around COGSA by providing in their bills of lading that only the law of a specified foreign country would apply and that any suit would have to be brought in the courts of that country. This court approved the provision in a bill of lading that Swedish law would apply and suits could be brought only in Swedish courts. Sweden applied the Hague Rules, and this undoubtedly was a persuasive factor in the decision, which also required that a clause of that kind be "not unreasonable in the setting of the particular case." *William H. Muller & Co.* v. *Swedish American Line Ltd.*, 224 F.2d 806 (2 Cir.) *cert. denied* 350 U.S. 903 (1955). The holding did, however, give a certain amount of encouragement to the inclusion of such a clause in a bill of lading wherever the foreign country's law was less favorable than COGSA to shippers, but such a provision actually violated COGSA because it lessened the carrier's liabilities. See Gilmore & Black, *Admiralty*, § 3-25 at 125, note 23 (1957). Therefore, *Muller* was expressly overruled by *Indussa Corporation* v. *S.S. Ranborg*, 377 F.2d 200 (2 Cir. 1967), by the full court sitting in banc, on the ground that the holding in *Muller* violated the provisions of COGSA, particularly § 1303(8), as well as its intent and purpose.

Turning to Clause 13 of the bill of lading issued by Universal in the case now before us, we see a new and ingenious device which carries with it the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA. This is doubtless the reason why the words ". . . so far as they may be applicable" were inserted following the Clause Paramount, required by 46 U.S.C. § 1312,[4]

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[4] The pertinent question of § 1312 reads as follows:

". . . every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter."

in the carrier's short form bill. In the first place Clause 13 places the burden of inquiry on the shipper, in circumstances in which it is highly unlikely that such an inquiry would be made, to search out a copy of the carrier's regular bill of lading to discover a clause which in effect authorizes a serious deviation from the standard provisions and which can only be prevented by the shipper's assuming the burden of giving notice to the carrier before delivery that below deck stowage is required. Even if the shipper, as in this case, never made any actual representation that the goods need not be stowed under deck, as Clause 13 says, never agreed that they might be stowed on deck and never had any notice or knowledge of the provisions of Clause 13, it would, nevertheless, by default lose the right to have its goods stowed below deck. Once the shipper has by default lost the right to under deck stowage, the concept behind Clause 13 assumes that the carrier is thereafter in a position to claim that the shipper has lost all its rights under COGSA because § 1301 by definition eliminates deck cargo from the provisions of the Act. *Pannell* v. *United States Lines Co.*, 263 F.2d 497, 498 (2 Cir. 1959), *cert. denied*, 359 U.S. 1013 (1959); *Globe Solvents Co.* v. *The California*, 167 F.2d 859, 862 (3 Cir.), *cert. denied*, 335 U.S. 844 (1948); *Blanchard Lumber Co.* v. *SS. Anthony II*, 259 F. Supp. 857, 864 (S.D.N.Y. 1966). This leaves the carrier free to write into the bill of lading his own rules as to liability and burden of proof, just as Universal did in the third paragraph of the clause. The shipper, at this point a shorn lamb wholly untempered to the wind, has placed upon it "all risk of loss or damage by perils inherent in or to incidental [sic] such carriage" and the carrier retains for itself, not only all benefits inuring to it under the bill of lading, but to make it absolutely certain, incorporates all the rights, immunities, exemptions and limitations provided for in § 1304 of COGSA except for five provisions which would require the carrier to assume the burden of proof,

as in (1), (2q) and (3) or where the carrier might be exposed to certain claims mentioned in the subsection, as in (2)(j) (see Gilmore & Black, *Admiralty*, § 3-34 at 143-144 (1957)), and (4). Clause 13 in its final sentence places the entire burden of proof of showing that loss or damage to cargo resulted from lack of due diligence or fault or neglect of the carrier on the shipper and goes on to reiterate the provision of § 1304 (2)(a) that in no event will the carrier be liable for any neglect or default in the navigation or the management of the ship. Thus, as the result of an unusual provision inserted by the carrier in its "regular" bill of lading, which it never specifically brought to the shipper's attention, and of which the shipper had no actual knowledge, the shipper was compelled to assume the risk of loss or damage resulting from above deck stowage of its goods, it lost its protection under COGSA, and was subjected to the burden of proof that loss or damage was due to the fault of the carrier, although evidence of such fault rests almost entirely in the hands of the carrier.

What adds to its unfairness is the context in which the ocean bill of lading functions. In accepting the short form, the shipper relies upon the fact that the long form, which is incorporated by reference, contains only the usual provisions which closely follow COGSA, unless there is some warning on the face of the short form of special terms or exceptions which differ from the COGSA provisions. If there is no definite agreement one way or the other, the shipper is entitled to expect below deck stowage.[5] It is

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[5] R. Colinvaux, Carver's Carriage of Goods by Sea 697 (11th ed. 1963). It is there stated that:

> "Goods ought not to be carried on deck if they are exposed to a greater risk than when stowed in the usual carrying part of the ship, unless the shipper has assented to their being so

impractical for a shipper to be compelled to make a detailed study of all of the fine print clauses of the carrier's regular bill on each occasion before it ships out a package. One of the principal purposes of COGSA was to obviate the necessity for doing so. At the time of its enactment the House Report, H. R. Rep. #2218, 74th Cong., 2d Sess. 7 (1936), said,

> "The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading."
>
> * * *
>
> "There are in existence hundreds of different forms of bills of lading with varying exceptions which will be eliminated by this legislation. This lack of uniformity creates an undesirable condition in business which will largely be corrected by this bill. On former occasions copies of bills of lading were presented to the committee. These bills contained exception clauses in print so fine they could only be read with great difficulty."

It is also interesting to note the remarks of Senator White made on the Senate floor during the debate on COGSA:

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carried, or unless a custom to carry in that way exists in the particular trade." *Id.* at 697.

See also J. Ridley, Carriage of Goods by Land, Sea and Air 104 (2 ed. 1965), where it is stated that "the carrier is, however, only entitled to stow goods in those parts of the ship which are normally used for stowage. . . . The deck is not a part of the ship normally used for stowage."

Appendix C

> "The bill is designed to bring about uniformity in ocean bills of lading precisely as through the years uniformity in bills of lading has been worked out covering land transportation." 79 Cong. Rec. 8954 (1935).

There was nothing whatever on the face of the carrier's short bill of lading to indicate that the containers were deck cargo. The shipper properly assumed it was receiving a clean bill of lading, and the carrier also considered that the short form meant a clean bill.[6] This was not, as the trial court suggested, a case of confusion between broad and narrow meanings of "clean bill" as described in *Givaudan Delawanna Inc.* v. *The Blijdendijk,* 91 F. Supp. 663 (S.D.N.Y. 1950). Rather a "clean bill" was understood by the parties as importing under deck stowage. It seems fairly clear that what happened was that the two containers were stowed, as understood, below deck but that there was no hold space to take the remaining six and they were arbitrarily stowed on deck.

While the obvious theory back of Clause 13 assumes that the shipper's failure to give written notice requiring below deck stowage makes the goods deck cargo and thereby frees the carrier from all of the strictures placed in COGSA for the benefit of the shipper, so that the carrier can write the rules about liability and burden of proof, we conclude that as the bare wording of Clause 13 stands, the shipper, even though it gave no such written notice as Clause 13 calls

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[6] The defendant carrier, in its memorandum in opposition to the plaintiff's motion for partial summary judgment in the district court said on page 2: ". . . six of the containers were stowed on deck, whereas a clean bill of lading N.Y. JY-15 was issued covering the shipment." Also counsel for the carrier in his accompanying affidavit said, page 5, "admittedly the carriage of six metal containers were carried on deck and this was not noted in the bill of lading."

for, nevertheless, did not lose its protections under COGSA because it literally does not come within COGSA's definition of the exception to "goods."

The terms of the agreement for the carriage of the containers of books were drafted and issued by the carrier and constituted a contract of adhesion. Consequently any special provisions, not uniformly standard in bills of lading and not required by COGSA, must be narrowly and strictly construed against the carrier. The rule of *contra proferentem* is discussed in 3 Corbin, *Contracts* § 559 (1960); among other things Professor Corbin said, at 269-270:

> "The rule is hardly to be regarded as truly a rule of interpretation. . . . It is chiefly a rule of public policy, generally favoring the underdog. . . . It may well be that the rule is applied mainly in cases where the agreement contains an 'unconscionable' or at least an 'unreasonable' provision, and the court feels that the attention of the party whom it affects adversely was not clearly called to it."

The relevant part of § 1301(c) which defines goods says, "The term goods includes goods, wares [etc.] . . . except . . . cargo which by the contract of carriage is stated as being carried on deck and is so carried." The bill of lading (short form and long form combined) nowhere states that the cargo *is being carried on deck.* Clause 13 says it *may* be so carried but not that it *is* being so carried. No consignee or assignee could tell from the bill whether it was below deck or on deck cargo.

In *St. Johns Corp.* v. *Companhia Geral,* 263 U.S. 119 (1923), the carrier and shipper entered into a formal written and signed freight reservation agreement which expressly gave the carrier the option to stow on deck or below deck. The carrier issued a clean bill containing no

reference to the freight agreement between the carrier and shipper and no statement that the goods were on deck cargo. The goods were jettisoned and lost in an emergency. The Supreme Court held that the issuance of the clean bill was, in effect, an exercise of the option in favor of below deck stowage, and because the cargo was stowed on deck, there was a deviation which made the carrier liable for the lost goods.

The *St. Johns* case is distinguishable from the present case in that there was in the former a separate written agreement for the option and no mention of it in the bill of lading, whereas in this case the option was in the regular form of the carrier. The carrier in *St. Johns* argued, in effect, that the option was exercised by the actual stowage on deck and the silence in the bill of lading didn't act as a promise to carry under deck. But the Supreme Court held it was the bill of lading that governed and determined how the cargo was to be stowed and that this was not affected by what the carrier did or by the terms of the separate freight agreement. In the present case the bill of lading stated the option, but it contained no information or declaration whatever as to how it was exercised. As in the *St. Johns* case the option could not be left to be exercised by the actual placing of the cargo on deck or below deck. The bill of lading did not, therefore, qualify the goods within the exception to § 1301(c) as "... cargo which by the contract of carriage is stated as being carried on deck ..."

As the terms of the bill of lading do not bring the cargo within the exception, the containers were "goods" to which COGSA applied. Clause 13 states that the carrier will not be liable for any damage unless the shipper proves negligence or lack of due diligence on the carrier's part. This effects a shift in the burden of proof from the carrier, as provided by COGSA, to the shipper. COGSA had

effected a change from the pre-Harter situation when the burden of proof was on the shipper, by shifting it to the carrier.[7] The burden of proof which COGSA has placed on the carrier is a major weapon in the shipper's arsenal.[8] It is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier's hands. Clause 13's attempted transfer of burden of proof to the shipper creates such a lessening of the carrier's liability as to be impermissible under § 1303(8).

Another reason why Clause 13 of the carrier's regular bill of lading cannot be invoked by Universal is because Universal is estopped from doing so. Certainly Universal, as the carrier, was chargeable with knowledge of Clause 13 in its own regular bill. In spite of this, it received delivery of the containers from United and put them on board *before* issuing the bill of lading. At that point in time it was impossible for the shipper "to inform the carrier in writing before delivery of the goods to the carrier" that under deck stowage was required. By accepting the goods without notifying the shipper that it would be subject to an option in the carrier to stow the containers on deck, the carrier waived any right it may otherwise have had to exercise such an option. The trial court's idea that the shipper was chargeable prior to delivery of the goods to the carrier and

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[7] The burden is normally on the carrier either to prove that it exercised due diligence or that it was free from negligence in the preparation of the ship and care and stowage of the cargo. See §§ 4(1) and 4(2)(q) of COGSA, 46 U.S.C. §§ 1304(1) and 1304(2)(q).

[8] The legislative history is quite emphatic on this point. See H. R. Rep. No. 2218, 74th Cong., 2d Sess. 8-9 (1936). The report stated, for example, that "this shift in the burden of proof [from the shipper to the carrier] will constitute a tremendous advantage to cargo owners." *Id.* at 9.

the issuance of the bill of lading with the terms the bill of lading was going to contain is untenable. There was no evidence in the case of preliminary negotiations or oral representations by either party relative to anything contained in the carrier's bill of lading except for the names of the persons concerned, a description of the cargo and its destination which were furnished the carrier through a short form bill prepared by United and apparently handed over to the carrier with delivery of the containers. The trial court's finding that Britannica was, from experience, familiar with Universal's bill of lading, headed "Orient Overseas Line," and that its agent, United, was, or should have been, because it dealt with Orient Overseas Line, infers too much. There is nothing whatever to show that Universal ever issued to Britannica or United a bill of lading containing Clause 13 or anything like it nor, for that matter, was there any evidence that they had ever been issued a bill by any other carrier containing such a clause or anything like it.

From what little there is in the record it appears as if the parties proceeded on the assumption that the carrier had given the shipper a clean bill importing below deck stowage and that it was only because of a stowage problem that arose after issuance of the bill that the carrier found it necessary to stow part of the cargo on deck. The carrier itself so regarded its own bill of lading throughout the pretrial proceedings [9] and the entire presentation of evidence in the trial. It was not until the defendant carrier filed its post-trial brief that any mention of Clause 13 of its bill of lading was made. Either it was thrown in as a possible make-weight or the carrier itself had forgotten about the clause, lost as it was in the obscurity of the barely decipher-

[9] See note 6, *ante*.

able columns of print in which the bill's many provisions were contained.

At the trial below, the defense did not rest upon Clause 13 as authorizing stowage on deck but on custom of the port. When for the first time in its brief the carrier mentioned Clause 13 as a defense to breach of contract of carriage, the trial court made this the cornerstone of its decision and gave in a footnote only a brief glance in passing at the issue of a custom in the port of carrying goods in containers on deck, in the following words:

> "Indeed, if a finding on this issue were required in this case, I would tend to the view that defendant, through its witnesses Rand and Sembler, established that in recent years there has been a growing practice of stowage of containerized cargo on weather decks of container ships and general cargo vessels."

The parties have continued to contest the issue of custom on appeal and some comment is called for. The carrier argues that there is a custom in the shipping industry of carrying containerized cargo on deck, regardless of the provisions of the bill of lading. If there is such a custom, the bill of lading will be presumed to have been issued subject to it and the shipper may not claim liability on the part of the carrier for on deck stowage. See *The Delaware*, 81 U.S. [14 Wall.] 579, 605 (1871);[10] *St. John Corp.* v. *Companhia Geral, supra.*

The record in this case discloses that the carrier did not prove the existence of such a custom in the Port of

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[10] Of course if the bill of lading specifically stipulates that there shall be under deck stowage, a custom to the contrary would not override the stipulation, and on deck stowage in such circumstances would be an unjustified deviation.

New York. It produced two witnesses who testified on this point. The first, one Rand who was a representative of the Grace Line, stated that his company would stow any container on deck even if the shipper desired under deck stowage. Such testimony is certainly insufficient to show a custom of the port. A party cannot claim to have proved a valid custom merely by showing that it is the habit of some carriers to stow goods on deck contrary to the wishes or knowledge of shippers. The mere habit of a carrier to stow cargoes anywhere it chooses, even if it is in breach of its contract, cannot be said to establish a custom. See *The Royal Exchange Shipping Co.* v. *W. S. Dixon & Co.*, 12 App. Cas. 11 (House of Lords 1886).

The gist of the testimony of the carrier's second witness, William Sembler, was that he knew it to be the practice of certain ships to carry containers on deck because they are "small ships designed for island trade." This testimony has no bearing on any custom of stowing containers on the decks of general ocean-going cargo vessels in international trade.[11] This witness also testified that he had seen containers on the decks of various ships in the New York harbor. But again, this is not evidence of a custom in the port. Incoming vessels from foreign ports would not show custom in the Port of New York. The fact that containers are at times carried on deck does not create a custom. They

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[11] Sembler testified that cargo was stowed on deck in the island trade because the ship's own gear had to be used to unload cargo at many small island ports. He noted that in such a situation it was not practical to stow the containers under deck. He also testified that certain refrigerated containers were stowed on deck because there were no electrical outlets for the refrigeration units below deck. None of these considerations is pertinent to the stowage issue in the present case.

could be on deck pursuant to contract or in violation of contract as well as pursuant to a custom.[12]

After examining all the testimony introduced on this point, we conclude that as a matter of law the carrier has presented no evidence which even tends to show that such a custom existed. The carrier is, therefore, not justified in claiming that the on deck stowage was permissible for that reason. We conclude that there was no custom in the port which justified Universal's stowage of the containers on deck nor can the carrier rely upon the authority of Clause 13 of its bill of lading for its action. In consequence the bill of lading must be treated as a clean bill importing below deck stowage. The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation. It is not disputed that the damage to the cargo was caused by sea water to which it was exposed by being stowed on deck. The carrier is liable for the full amount of damages sustained without the benefit of the $500 limitation per package of COGSA. *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953). The measure of damages is the fair market value at Yokohama, Japan, of the damaged sets in the condition they were in when shipped, less any salvage. *St. Johns Corp.* v. *Companhia Geral, supra,* at 125; *The Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.*, 294 U.S. 494, 496 (1935); *R. T. Jones Lumber Co.* v. *Roen Steamship Co.*, 270 F.2d 456, 459 (2 Cir. 1959).

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[12] The defendant repeatedly made reference to the fact that so-called "container ships" carry containers on deck. This fact has no bearing on the propriety of on deck stowage in the present case. A container ship is specially outfitted safely to stow containers on deck. The Hong Kong Producer is a general cargo vessel and has no special rigging for the purpose. What may be an established custom for container ships is not proof of a custom in the port for general cargo vessels.

Appendix C

The judgment of the district court is reversed and the case is remanded for the determination of the issue of damages.

HAYS, *Circuit Judge* (dissenting):

I.

It is unlikely that, except for the district judge, who in the course of his careful opinion never once mentioned COGSA, anyone will be more astonished at the majority opinion in this case than the appellant who in a forty-nine page brief addressed two pages to an almost *pro forma* argument on COGSA.

I suppose that nobody would deny that a carrier and a shipper can agree that cargo is to be stowed on deck. Not only has some cargo always been carried in this way, see *Davidson* v. *Flood Bros.*, 30 F.2d 279 (9th Cir.), cert. denied, 279 U.S. 853 (1929); *The Peter Helms*, 24 F. Supp. 461 (W.D. Wash. 1938); *American Tobacco Co.* v. *The Katingo Hadjipatera*, 81 F. Supp. 438 (S.D.N.Y. 1948), modified, 194 F.2d 449 (2 Cir. 1951), cert. denied, 343 U.S. 978 (1952); *Givaudan Delawanna* v. *The Blijdendijk*, 91 F. Supp. 663 (S.D.N.Y. 1950), but the district judge in the present case said that if a finding were required he would "'tend to the view that defendant . . . established that in recent years there has been a growing practice of stowage of containerized cargo on weather decks. . . .'"

COGSA itself recognizes that the contract of carriage can properly provide that cargo is to be carried on deck (46 U.S.C. § 1301(c) (1964)).

Appendix C

The only issue in this case is the simple question of whether the shipper agreed that the carrier could, if it so chose, stow the cargo on deck.[1]

From the majority opinion one might gather that devilishly clever Chinese carriers were dealing with the unworldly professors who write the articles for the Encyclopaedia. In fact not only does the Encyclopaedia Britannica, Inc. regularly ship books to all parts of the world, but in the present instance it hired an agent, the sole business of which consists of assembling and shipping cargo and which conducts this business everyday with many different shipping lines. Moreover, whatever the need for protection of small, individual shippers from being forced into "contracts of adhesion" by large carriers, one might well question whether carriers may seek to curry favor with shipping agents such as we have here who conduct a large business in assembling cargo from many shippers for carriage in containers.

The shipper was made aware of the existence of the regular bill of lading by the reference in the short form bill of lading which was delivered to it. It was the duty of the shipper's agent as an ordinary prudent businessman regularly engaged in the shipping business to examine the conditions under which the shipper accepted the cargo for shipment. If the shipping agent chose to ship the cargo without knowing anything whatever about the terms and conditions of the contract of carriage (as it now declares

[1] The majority seeks to make much of a clause in the bill of lading which purports in certain cases to shift the burden of proof, claiming that the clause is ineffective by reason of contrary provision in COGSA. But, even assuming the majority is right as to the clause they question, the whole issue is totally irrelevant, since in the present case there is no issue of burden of proof. Surely the presence of a single clause that may be repugnant to COGSA does not serve to invalidate the entire bill of lading.

it did) it cannot now complain that that contract was not to its liking. Nor can the Encyclopaedia Brittanica, Inc. recover on the ground that its agent accepted a contract without knowing its terms.

The shipping agent was, of course, familiar with the almost universal practice of delivering the bill of lading after receipt of the goods.

> "It is true that the bill of lading is generally not issued until after the contract has been made; both parties, however, undoubtedly contemplate the issuance of a bill of lading, and the courts have found little difficulty in holding that the terms of the bill of lading constitute a part of the contract." Poor, Charter Parties and Ocean Bills of Lading § 59, at 134-135 (5th ed. 1968); see *Luckenbach S.S. Co.* v. *American Mills Co.*, 24 F.2d 704 (5th Cir. 1928); *Dietrich* v. *United States Shipping Board Emergency Fleet Corp.*, 9 F.2d 733, 740-41 (2d Cir. 1925), cert. denied, 278 U.S. 647 (1928).

If the agent had been interested in the terms of the contract, it could have requested a copy of the form in advance of delivery. If it was not interested the shipper cannot now complain of those terms.

II.

In any event, the shipper's recovery should be limited to $500 per package pursuant to Section 4(5) of COGSA (46 U.S.C. § 1304(5) (1964)). *Atlantic Mutual Insurance Co.*, v. *Poseiden Schiffahrt G.m.b.H.*, 313 F.2d 872 (7th Cir.), cert. denied, 375 U.S. 819 (1963). By its express terms, that section applies "in any event."

Appendix C

Perhaps if the stowage of the cargo on deck had constituted a breach of the contract of carriage, its provisions would be inapplicable. But it seems highly unlikely that without including some more specific statutory direction the draftsman of COGSA intended that a breach of contract should relieve the carrier and the shipper of their rights and duties under the Act. The provisions of COGSA apply independently of any contract. See Benedict, 1 The Law of American Admiralty 291 n. 35 (Knauth ed. 1940). Indeed, it is generally accepted that COGSA modified the doctrine of deviation in maritime law at least to the extent that insurer's liability attaches only when the damage is causally related to the unreasonable deviation. See *Searoad Shipping Co.* v. *E. I. du Pont de Nemours and Co., Inc.*, 361 F.2d 833, 835-36 (5th Cir.), cert. denied, 385 U.S. 973 (1966); Gilmore and Black, The Law of Admiralty §§ 3-40 and 3-41 (1957). It is difficult to understand how the majority opinion can take the position that it is so important to protect an experienced shipper from losing the benefits of COGSA by agreeing to on deck stowage and yet can adopt the view that a breach of the contract of carriage nullifies the carefully balanced provisions of the Act.

Furthermore, it seems to me that each container as a unit is the package to which the $500 limitation should be applied. In *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische, Etc.*, 375 F.2d 943 (2d Cir.), cert. denied, 389 U.S. 831 (1967), this court held that the per package limitation applied to each of nine pallets, each containing six cardboard cartons of 40 television tuners and fastened with metal straps. In reaching this decision, the court relied on the characterizations of the parties, including document descriptions, the fact that it was the shipper who made up the cartons into a pallet for convenience and safety in handling, and the fact that the shipper had the option under

section 4(5) to obtain full coverage by declaring the value of the goods and paying a higher tariff.

Here the containers were delivered to the carrier by the shipper's agent already packed with the individual cartons of encyclopedias. On the bill of lading delivered to the agent by the carrier upon receipt of the containers, the "No. of Pkgs." and the "Description of Packages and Goods" were given as, e.g., "(1) One metal container No. UCC-5330 said to contain: 536 ctns. bound books." The shipper made no objection to this description. I would thus hold that the parties intended each individual container to be considered as the functional packing unit, that considering the containers as the packages promotes uniformity and predictability, and, accordingly, that the $500 per package limitation applies to the containers.

Appendix D

(Judgment)

UNITED STATES COURT OF APPEALS

FOT THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of October, one thousand nine hundred and sixty-nine.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

———o———

ENCYCLOPAEDIA BRITANNICA INC.,

Plaintiff-Appellant,

v.

S.S. HONG KONG PRODUCER, her engines, etc., and UNIVERSAL MARINE CORPORATION,

Defendants,

UNIVERSAL MARINE CORPORATION,

Defendant-Appellee.

———o———

Appeal from the United States District Court for the Southern District of New York.

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO
Clerk

Appendix E

(Order of the Court of Appeals Denying Rehearing)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

ENCYCLOPAEDIA BRITANNICA INC.,

Plaintiff-Appellant,

v.

S.S. HONG KONG PRODUCER, her engines, etc.,
UNIVERSAL MARINE CORPORATION,

Defendants-Appellees.

—o—

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

LEONARD P. MOORE

PAUL R. HAYS

ROBERT P. ANDERSON

Circuit Judges

November 18, 1969.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1126

UNIVERSAL MARINE CORPORATION and
S.S. HONG KONG PRODUCER, her engines, etc.,

Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

F. Herbert Prem,
Counsel for Respondent,
99 John Street,
New York, N. Y. 10038.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1126

UNIVERSAL MARINE CORPORATION and S.S. HONG KONG PRODUCER, her engines, etc.,

Petitioners,

vs.

ENCYLOPAEDIA BRITANNICA, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioners by their willful breach of a maritime contract providing for the transportation of respondent's cargo under-deck rather than on-deck, caused respondent to sustain a loss of $172,200, as a consequence of the resulting unreasonable deviation. Petitioners now ask this Court for limitation of liability to the nominal sum of $1,000, in lieu of their liability at common law as insurers, as was held by the court below.

Counter-statements of Questions Presented

1. Did petitioners act in stowing on-deck, thereby exposing to greater risk of damage, goods agreed to be carried under-deck, displace the bill of lading and make them liable for the full amount of damages sustained without

the benefit of the $500 limitation per package of the Carriage of Goods by Sea Act? [1] (33a).

2. Did the Court of Appeals err in declaring invalid, because of impossibility of performance, clause 13 of petitioners' regular form of bill of lading, incorporated by reference in their short form bill, issued to respondent *after* receipt of the goods by petitioners, which required respondent "to inform the carrier in writing *before delivery of the goods to the carrier*" that under-deck stowage was required? (14a-16a, 29a-30a, 33a).

The Decision of the Court of Appeals

In reversing and remanding, the lower court made an exhaustive review of the record, factually and legally (14a-34a), the principal conclusions being:

(1) The short form bill of lading, duly signed by petitioners' agent and delivered to respondent's agent, was "clean", importing under-deck stowage (14a-16a, 33a) (citing *St. Johns Corp.* v. *Companhia Geral,* 263 U. S. 119 [1923]).

(2) Clause 13 of the regular form bill of lading, not given to respondent, which required the latter to notify petitioners, *prior to delivery of the goods,* that it desired under-deck stowage, is invalid because of impossibility of performance (16a, 22a, 26a), which was characterized by the court as:

> "* * * a new and ingenious device which carries with it the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA" (22a).

[1] 46 U. S. C. 1304(5).

(3) "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation", having the effect of displacing the bill of lading and making petitioners "liable for the full amount of damages sustained, without the benefit of the $500 limitation per package of COGSA", measured on the fair market value at destination, less any salvage (33a; citing *Jones* v. *Flying Clipper,* 116 F. Supp. 386 [SDNY 1953]).

Of the aforementioned lower court rulings, petitioners have elected to rely upon (2), relating to the validity of clause 13 of the regular form bill of lading, and (3) the effect of the unreasonable deviation upon petitioners right to the $500 limitation per package of Section 4(5) of COGSA [46 U. S. C. §1304][5]).

ARGUMENT

POINT I

The lower court's ruling declaring Clause 13 to be invalid is correct.

(a) It was impossible for respondent to have performed the condition imposed by Clause 13 of giving notice prior to delivery of the cargo to petitioners that it desired under-deck stowage, because the bill of lading, referring to that clause, was received by respondent from petitioners after delivery of the cargo.

Clause 13 of the regular form lading required respondent to inform petitioners

> "in writing *before* the delivery of the goods to the carrier that the containers should be stowed under deck" (16a; italics in lower court opinion),

Since neither respondent, nor its shipping agent, had notice of clause 13, prior to the issuance of the short form bill, the requirement therein was impossible of performance and, therefore, not effective against respondent.[2]

On the date the bill of lading was issued, the containers were beyond recall—the ship having sailed on that date, without the knowledge of respondent, or its shipping agent, that the containers were stowed on deck (17a).

American Tobacco Co. v. *The Katingo Hadjipatera,* 81 F. Supp. 438 (SDNY 1948).

(b) Clause 13 is invalid because it is in conflict with Sections 3(2) and (8) of the Carriage of Goods by Sea Act (46 U. S. C. §§1303(2), (8) and Sections 1 and 2 of the Harter Act (46 U. S. C. §§190, 191).

It has been judicially acknowledged that on-deck carriage exposes cargo to greater risk of loss than stowage under-deck.

St. Johns Corp. v. *Companhia Geral, etc.,* 263 U. S. 119, 124 (1923);
Globe Solvents Co. v. *The California,* 167 F. (2d) 859, 863 (3 Cir. 1948).

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[2] The following excerpt is from the lower court's opinion (29a):

"Another reason why Clause 13 of the carrier's regular bill of lading cannot be invoked by Universal is because Universal is estopped from doing so. Certainly Universal, as the carrier, was chargeable with knowledge of Clause 13 in its own regular bill.

In spite of this, it received delivery of the containers from United and put them on board *before* issuing the bill of lading. At that point in time it was impossible for the shipper 'to inform the carrier in writing before delivery of the goods to the carrier' that under deck stowage was required" (italics in opinion).

Petitioners' duty to care for the containers, under a "clean" bill of lading, is specified in Sections 1 and 2 of the Harter Act (46 U. S. C., §§190-191)[3] and COGSA, Section 3(2) (46 U. S. C. §1303(2)).[4]

As petitioners, despite their statutory duty, subjected the containers to greater peril by their stowage on-deck, they failed to exercise the required due diligence under the aforementioned sections.

Clause 13 also violates Section 3(8) of COGSA (46 U. S. C. Sec. 1303[8])[5] which prohibits a carrier from "lessening" its liability as provided in the Act.

As the decisions are uniform in holding that on-deck stowage under a clean bill of lading is negligence of the grossest character, abrogating the contract of carriage, petitioners attempt to escape their insurer's liability, through the guise of clause 13, makes that clause a "covenant and agreement" under Section 3(8) "lessening" their liability for failure to perform their obligations under COGSA 3(2) to "properly and carefully * * * stow"

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[3] "It shall be unlawful for the * * * owner of any vessel * * * to insert in any bill of lading * * * any clause * * * whereby it * * * shall be relieved from liability for loss or damage arising from * * * failure in proper loading, stowage, custody, care, or proper delivery of any * * * property committed to its * * * charge" (Sec. 190); " * * * or whereby the obligations * * * to carefully handle and stow her cargo and to care for and properly deliver same shall in any wise be lessened, weakened or avoided" (sec. 191).

[4] "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." (Schroeder Bros. Inc. v. The Saturnia, 226 F. (2d) 147, 150 (2 Cir., 1955)).

[5] "Any clause, covenant, or agreement in a contract of carriage relieving the carrier * * * from liability for loss or damage to * * * goods, arising from negligence * * * in the duties * * * provided in this section, or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect."

the containers. Because clause 13 is violative of both Sections 3(2) and 3(8), the lower court correctly held it to be invalid.

(c) Clause 13 is unenforceable because petitioners, having issued a clean bill of lading, they failed to note thereon that the containers were to be carried on deck.

The court below found:

> "The bill of lading (short form and long form combined) nowhere states that the cargo *is being carried on deck.* Clause 13 says it *may* be so carried. No consignee or assignee could tell from the bill whether it was below deck or on deck cargo" (27a; italics by court).
>
> * * *
>
> "In consequence the bill of lading must be treated as a clean bill importing below deck stowage" (33a); and that
>
> "* * * the carrier has presented no evidence which even tends to show * * *"

the existence of a custom in the port of New York to stow cargo on deck for which a clean bill of lading had been issued (33a).

In so ruling the court below cited *St. Johns Corp.* v. *Companhia Geral,* 263 U. S. 119, 125 (1923) stating that this Court there held:

> "* * * that the issuance of the clean bill of lading was, in effect, an exercise of the option in favor of below deck stowage, and because the cargo was stowed on deck, there was a deviation which made the carrier liable for the lost goods" (28a).

Clause 13 is also unenforceable because the absence of an "on deck stowage" statement on the face of a negotiable bill of lading is misleading to foreign purchasers who rely upon the legal, as well as commercial, understanding that:

> "A clean bill of lading, in general, imports, unless the contrary appears on its face, that the goods are to be safely and properly secured under deck." *The Propeller Niagara* v. *Cordes*, 21 Howard, 7, 23 (1858).
>
> *The Delaware*, 14 Wall. 579, 602, 604 (1871); *The Idefjord*, 114 F. 2d 262, 266 (2 Cir. 1940); *Jones* v. *Flying Clipper* (116 F. Supp. 386, 389 (1953)); Gilmore & Black, The Law of Admiralty (p. 106).

American Mills v. *Luckenbach S.S. Co.*, 24 F. 2d 704 (5 Cir., 1928; concerning a dock fire) and *Bank of California* v. *International Mercantile M. Co.*, 64 F. 2d 97 (2 Cir. 1933; concerning a misdelivery); cited by petitioners at pages 12 and 13 in support of their contention that the lower court erred in ruling that clause 13 is invalid, are clearly distinguishable. The clauses considered in those cases were not of the unique character of clause 13 in petitioners' bill of lading, i.e., impossible of performance; nor was the issue of unreasonable deviation involved.

Davidson v. *Flood Bros.*, 30 F. 2d 279 (9 Cir. 1929), also cited by petitioners at page 13, is a pre-COGSA decision which is in conflict with the preponderating authority cited under following Point II and, particularly, is contrary to the recent *Francosteel* case, a decision by the Court of Appeals in the same State, in respect of which this Court denied certiorari.[6] Moreover, the bill of lading did not contain a clause 13, impossible of performance.

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[6] Francosteel Corp. v. N. V. Nederlandsch, 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. denied 389 U. S. 931 (1967).

POINT II

Petitioners unreasonable deviation makes unavailable to them the benefit of the Carriage of Goods by Sea Act $500 limitation.

(a) Prior to COGSA, a willfully deviating carrier could not avail itself of bill of lading exemptions from, or limitations of, liability,[7] or statutory provisions for the carrier's benefit.[8]

The basic reason therefor being that an unjustifiable deviation changes the character of the voyage so essentially as to amount to an entirely different venture from that contracted for.

(b) The decided weight of authority, after the passage of COGSA, follows the rationale of the prior cases holding that an unreasonable deviation not only deprives carriers of all exemptions and limitations in bills of lading, but also those provided by statute.

The question of whether on deck carriage of cargo, for which an under deck bill of lading was issued, deprives an ocean carrier of COGSA's $500 limitation, was answered in the affirmative by the precedent establishing decision of *Jones* v. *The Flying Clipper*, 116 F. Supp. 386 (1953 SDNY). No appeal was taken by the carrier in that

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[7] St. Johns Corp. v. Companhia Geral, etc., 263 U. S. 119, 124 (1923); The Willdomino v. Citro Chemical Co., 272 U. S. 718, 725, 727 (1927); The Malcolm Baxter Jr., 277 U. S. 323, 331 (1928); The Sarnia, 278 Fed. 459, 463 (2 Cir., 1921); cert. den. 258 U. S. 625 (1922).

[8] U. S. Shipping Board E. F. Corp. v. Rosenberg Bros. Co., 12 F. 2d 721, 723 (9 Cir. 1926); Niles-Bemont-Pond v. S.S. Balto, 282 Fed. 235, 237 (2 Cir. 1922); The Pelotas, 66 F. 2d 75, 77 (5 Cir., 1933); General Electric Co. v. Argonaut S.S. Line, 7 F. Supp. 710, 711 (EDNY 1934); The Indrapura, 171 Fed. 929, 938 (DC Ore., 1909).

case, which was represented by the law firm of which petitioners' counsel herein is a partner.

There was no further ruling upon the point until *Atlantic Mutual Insurance Co.* v. *Poseidon, etc.* (206 F. Supp. 15 [N. D. Ill., E. D., 1962]), in which it was held that while an unreasonable deviation deprived the carrier of the benefit of contractual limitations, it did not have that result in respect of statutory limitations, specifically, COGSA's time for suit limitation.[9] That judgment was affirmed on appeal (313 F. 2d 872; 7 Cir. 1963). A similar contention was rejected by the District Court in *Jones* v. *Flying Clipper, supra* (116 F. Supp. 386).

Atlantic Mutual v. *Poseidon, supra,* is the sole appellate decision that permits a carrier to limit its liability under COGSA where there has been an unreasonable deviation. It is significant that the Atlantic Mutual opinion cites no authority supporting the ruling: the authorities are to the contrary.

The *Jones* decision was cited favorably and *Atlantic Mutual* v. *Poseidon* rejected, by the Fifth Circuit in *Searoad Shipping Co.* v. *E. I. duPont De Nemours & Co.* (361 F. 2d 833 [5 Cir. 1966] cert. den. 385 U. S. 973). In the *Searoad* case, the carrier stowed a trailer-van on deck, for which a clean bill of lading had been issued. The Court said (pp. 835-836):

> "* * * we have no doubt that the insurer liability continues after COGSA to flow from on deck deviation where the damage is causally related."

The existence of a causal relation in the present case is shown by the District Court's finding that respondent's cargo was damaged by sea water during the voyage (17a).

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[9] 46 U. S. C. §1303(6).

A further appellate decision applying the rule in *Jones* v. *Flying Clipper,* is *Francosteel Corp.* v. *N. V. Nederlandsch* (249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. den. 389 U. S. 931 [1967]). In that case, the appeal was from a judgment dismissing the complaint on the ground that the action was barred by COGSA's one-year time for suit provision. Plaintiff urged that defendant's on-deck carriage, under a clean bill of lading, constituted an unjustifiable deviation which nullified that statutory defense.

The appellate court sustained the carrier's time for suit defense stating:

> "There is nothing inherent in the violation of deck stowage which prevents the shipper from discovering his loss and pursuing his claim for damages" (p. 2462).

But ruled further:

> "* * * that insofar as a deviation, or breach of the contract which would at common law render the contractual provisions void, contributes to or causes a loss, the carrier cannot rely on provisions which permit it to escape liability for the damages resulting therefrom" (pp. 2461-62).

In making the latter ruling, the court rejected that part of the decision in *Atlantic Mutual* v. *Poseidon,* that held COGSA's $500 limitation applicable notwithstanding the on-deck stowage under a clean bill of lading, in the following language (p. 2460):

> "From the foregoing cases it appears that defendant's reliance on Poseidon resembles a sand castle in danger of engulfment from a rising tide of contrary opinion. (See Criticism of the District Court decision [N. D. Ill., 1962], 206 F. Supp. 15, which

was affirmed in Poseidon; Note, 36 Temple L. Q. 222 (1963) and Note on Flying Clipper, 102 U. of Pa. L. Rev. 797 [1954]).''

POINT III

COGSA made no change in the law of Ocean Carriage as to the effect of an unreasonable deviation upon a carrier's liability.

COGSA's only reference to deviation is in Section 1304(4)[10]. That section declares merely that certain types of deviation to be justifiable, while other acts shall be considered, *prima facie,* unreasonable deviations.

If it had been the intention of Congress to effect a change in the common law rule by abolishing the existing penalty, there was no necessity for including Section 4 in the Act. The language of Section 4 shows that the intent of Congress was to liberalize the law of deviation by limiting the penalty existing prior to COGSA only for an unreasonable deviation.

That there was no intent to repudiate the pre-COGSA penalty finds support in the following authorities:

Jones v. *Flying Clipper, supra* (116 F. Supp. at pp. 389, 390).[11]

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[10] "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

[11] "There is nothing in the history of the Act to indicate that Congress by fixing the limitation at $500 intended to displace the

(footnote continued on next page)

Knauth, Ocean Bills of Lading (4th Ed. 1953) (p. 241).[12]

The post-COGSA decisions support the views expressed above as to the effect of an unreasonable deviation.[13]

(footnote continued from previous page)

doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. Such a drastic change in the existing law, with its far-reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms."

"To uphold the carrier's contention that the limitation of liability is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing that it cannot be called upon to pay more than $500 per package."

"Such a policy, if upheld, would immunize the carrier against the consequences of its own willful actions at the expense of an innocent party. In effect, it would result in granting to the carrier exoneration for all damages in excess of $500, even in instances where its conduct in changing the essential nature of the contract caused the damages."

[12] "Neither the Convention nor any Act passed under the Convention contains any provision concerning the legal result of a deviation. Nor is there any other statute on the subject. Consequently the general case law continues to furnish the rule."

[13] Haroco Co. Inc. v. The Tai Shan, 111 F. Supp. 638, 645-646 (SDNY), aff'd 218 F. 2d 822 (2 Cir. 1955), and Hoskyn & Co., Inc. v. Silver Line, Ltd., 63 F. Supp. 452, 468 (SDNY, 1943), aff'd 143 F. 2d 462 (2 Cir. 1944), in which the courts considered fire losses arising subsequent to COGSA and held that unreasonable deviation can deprive carriers of statutory liability exemption under the Fire Statute and similar fire exception of COGSA.

Switzerland General Insurance Co. v. Navigazione Libera Triestina S.A., 91 F. 2d 960, 963 (Cir. 2, 1937), which concerned the British Carriage of Goods by Sea Act. It was held that cargo had failed to establish an unreasonable deviation and, therefore, was denied a recovery because of non-compliance with the one-year time for suit provision.

(footnote continued on next page)

Also the following cases relating to statutory limitations which are considered at pages 9-10, *supra*.

Searoad Shipping Co. v. *E. I. duPont de Nemours Co., supra,* (361 F. 2d 833, 835-836 [5 Cir., 1966], cert. denied 385 U. S. 973);

Francosteel Corp. v. *N. V. Nederlandsch, supra,* (249 Cal. App. 2d 880; 57 Cal. Reptr. 867 [9 Cir., 1967], cert. den. 389 U. S. 931 (1967)).

(footnote continued from previous page)

American Cyanamid Co. v. Booth S.S. Co., 99 F. Supp. 232, 236 (SDNY, 1951), aff'd 195 F. 2d 529 (2 Cir., 1952), a stranding case: It was there held that cargo, having failed to establish an unreasonable deviation, the carrier was not denied the benefit of COGSA's exemption from liability for errors in navigation of the vessel.

Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd., [House of Lords, 1932] A. C. 328, 340, 41 Ll. L. Rep. 165, a case under the British Carriage of Goods by Sea Act where the carrier claimed the benefit of the exemption from liability for errors in navigation of the vessel.[14]

[14] Lord Atkins said:

> "I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of the contract of carriage of goods by sea to which the Act applies."

Lord Russell of Killowen at page 347.

> "It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only apply to the contract voyage. If it had been the intention of the legislature to make so drastic a change in the law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms."

U. S. v. *Atlantic Mutual Ins. Co.*, 343 U. S. 326 (1952), held that the public policy permitting an innocent party to collect in full from either of two joint tort feasors overrode the COGSA exemption from liability for errors in navigation and that the clause was void. Gilmore & Black, The Law of Admiralty, (1957) comment upon this Court's refusal in *U. S.* v. *Atlantic Mutual, supra,* to extend the carrier's rights under the Harter Act and COGSA by "analogy, inference, or appeals to symmetry and 'reasonableness'." [15]

Virtually all of the well known authors of texts on admiralty law have expressed similar views.[16]

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[15] "The Supreme Court declared the clause invalid in an opinion which shows how much vitality is left in the traditional American notions on 'negligence' clauses of all sorts in contracts of carriage. Pointing out that the public policy of this country had, prior to the Harter Act, been resolute in denying carriers the right to escape by 'contract' the consequences of their negligence, the Court further noted that the Harter Act and COGSA, being compromises, carved out definite exceptions to this principle. But it declined to extend these exceptions by inference to include a matter not expressly covered" (page 154).

* * *

"It shows the Supreme Court firmly opposed to the view that the carrier's rights under Harter and COGSA are to be extended by analogy, inference or appeals to symmetry and 'reasonableness.' The exculpatory sections of these acts, it may now be said on authority, represented limited concessions to the carrier interests. Over vigorous dissent on this very point, by Mr. Justice Frankfurter, *the Court refused to see in these enactments any general repudiation of antecedent policy long hardened into rules of law"* (italics supplied) (page 155).

[16] Williston on Contracts, Vol. IV, pp. 3080-3082; Carver, Carriage of Goods by Sea, Vol. 1, Sec. 299, p. 300 (11th Ed.); Longley, Common Carriage of Cargo (1967) (pp. 129-131; Robinson on Admiralty, p. 533 (1939 Ed.); Tetley, Marine Cargo Claims (1965) p. 19.

POINT IV

The legislative history, as well as the text of COGSA, establish that the intention of the legislators was to increase the carrier's liability and particularly that they intended that the $500 limitation did not apply in a case of deviation not excusable under COGSA, §4(4).

The court in *Atlantic Mutual* v. *Poseidon, supra,* stated its accord with the District Court's ruling in *Jones* v. *Flying Clipper, supra,* that the deviation principle is "firmly entrenched in Admiralty Law"; yet it rejected that principle without specific authorization in the statute. The court reached that result despite the clear intent of the language of the Act to preserve the consequences of deviation. Moroever, testimony given during the Congressional hearings on the proposed legislation was to the effect that the purpose of the limitation provision was to *increase,* and not decrease carrier's liability.

Committee reports and statements of the sponsors of legislation are significant expressions of legislative intention. *Wright* v. *Vinton Branch,* 300 U. S. 440, 463-464 (1937); *Duplex Co.* v. *Deering,* 254 U. S. 443, 474-475 (1921).

Numerous hearings were held at Washington upon COGSA from 1921 until 1936, during the course of which representatives of cargo and hull interests were asked by various Congressional Committees to express their views. Statements by Senator White, who introduced the bill, which initially bore his name, gave clear indication that the proposed legislation was for the interest of the shippers rather than the carriers, and that the common law rule of

liability in respect of damage occurring during an unreasonable deviation was to be unchanged.[17]

Additional legislative support for Senator White's statement that "our law remains * * * unaffected and unimpaired" by COGSA, appears in House Report 2218, 74th Cong. 2nd Session:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce. *It fixes an irreducible minimum of immunity of the carrier from liability*" (p. 1) (Italics supplied).

That the language of Section 4(4) of COGSA, and the Congressional hearings leading up to its enactment, forbid carriers to alter their common law liability for losses causally relating to unreasonable deviations, is shown by the views expressed by the representatives of hull interests who testified at those hearings, particularly the state-

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[17] "I may say that one of the outstanding purposes of the proposed legislation is to increase the character and degree of responsibility of the carriers; and the bill was designed in large measure in the interest of the *shippers rather than of the carriers.* * * *

* * * The legislation supersedes the so-called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. Otherwise, *our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.*" S. 1152, 74th Cong. 1st Session, 79th Cong. Rec. p. 13341 (part 12) (1935) (Italics supplied).

* * *

"Four principal changes in the law will be worked by the legislation:

The first one has reference to the limit of liability. Under this provision I should say generally that the limit of liability of the carrier is substantially *increased.*" (79th Cong. Rec. pt. 12, 74th Cong. 1st Sess. p. 13341) (Italics supplied).

ments of Mr. Charles S. Haight [18] of Haight, Gardner, Poor & Havens and Mr. Ira Campbell [19] of Kirlin, Campbell & Keating, senior partners of their respective New York law firms, who appeared as counsel for hull interests.

POINT V

The phrase in Section 4(5) of COGSA, "in any event", does not provide protection for the petitioners herein.

In reaching the conclusion that the carrier's deviation did not deprive it of the benefit of COGSA's Section 4(5), the court in *Atlantic Mutual* v. *Poseidon, supra,*—upon which petitioners base their principal reliance—adopted the single ground on which the District Court predicated its conclusion and, indeed, quoted at length from the opinion of that court. There is no suggestion in the appellate court's opinion of independent legal research of the issue of law presented. The basis of the District Court's ruling, thus accepted by the appellate court, is that Congress in employing the words "in any event", intended to give an

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[18] "Q. Referring to Mr. Herrick's famous case, do you think any court would hold the deviation of which he complains would be a reasonable deviation?" Mr. Haight replied: "It is unthinkable * * *. Q. In other words, if Mr. Herrick had had the benefit of these rules at that time, he would have had full recovery and would never have that case to complain of?" Mr. Haight: "If he had these rules in that case probably full recovery would have been awarded." (House Committee, Merchant Marine and Fisheries, 67th Cong. 4th Sess.) (p. 103).

[19] "Deviation is an exceedingly vital subject to the shipowners, because it not only renders the shipowners liable for losses that may result from the deviation itself but liable for any other loss that happens on the voyage, whether connected with the deviation or not; it makes him absolutely an insurer." (House Committee, Merchant Marine and Fisheries, 68th Cong. 2nd Sess. p. 139.)

absolute right which could not be denied carriers, regardless of the character of the act which caused the loss or damage to the cargo owner's property. The District Court also concluded that the phrases "in any event" and "any loss or damage" in section 4(5) of COGSA (46 U. S. Code, Sec. 1304(5), indicated an intention on the part of Congress to effect a change in the existing law that an unjustifiable deviation is such a fundamental breach of the contract of carriage as to deprive it of the benefit of all contractual and statutory limitations of liability (313 F. 2d at p. 875).

The same contention was advanced by the law firm of which counsel in the present case is a partner, in their representation of the vessel owner in *Jones* v. *The Flying Clipper, supra* (116 F. Supp. 386) and was rejected by the District Court because the unreasonable deviation had abrogated the contract of carriage.[20]

The Dissenting Opinion in the Court Below

The dissenting Judge's view that petitioners are entitled to the benefit of COGSA's $500 limitation, despite

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[20] "Much of the carrier's argument for preserving 'in any event' the limitation of liability rests upon a basic misconception of the nature of its breach in stowing the cargo on deck. It attempts to equate unjustifiable deviation with ordinary breaches of obligation under the Act, such as lack of due diligence to make the vessel seaworthy, or properly and carefully to handle, stow, care for, or deliver her cargo and the like. But mere negligence with regard to stowage or handling of the cargo has never constituted deviation. Deck stowage where underdeck stowage is required is more than negligence—it is a deviation with resulting abrogation of the contract. And in my view it is unnecessary to base the voiding of the contract on the ground that it was the result of the carrier's 'gross' violation of its terms; or his 'misconduct'; or that on deck stowage under a clean bill of lading 'would work a fraud'; or that the carrier 'converted' the cargo. It is sufficient that the carrier's voluntary action in unjustifiably deviating so changed the essence of the agreement as to effect its abrogation". (opinion, pp. 389-390).

their willful deviation, is predicated upon the sole appellate authority of *Atlantic Mutual* v. *Poseidon, supra* (313 F. 2d 872; 7 Cir., 1963) (36a).

The inconsistencies of the Poseidon opinion, its conflict with the language and spirit of COGSA and the opinions of the various Federal trial and appellate court decisions, suggests that the dissenting Judge's reliance upon *Atlantic Mutual* v. *Poseidon* is misplaced.

The dearth of authority and absence of analysis in the dissenting opinion also suggests an *en passant* consideration of the issues which, we submit, is in significant contrast to the exhaustive and scholarly opinion of the majority Judges.

Specific errors of the dissenting Judge are readily apparent:

(a) The excerpt quoted from the opinion in Searoad Shipping Co. v. E. I. duPont etc. (361 F. 2d 833 [5 Cir.], cert. den. 385 U. S. 973 [1966] that "the doctrine of deviation in maritime law at least to the extent that insurer's liability attaches only when the damage is causally related to the unreasonable deviation" (37a), is not pertinent to the present case because a causal relation was established, i.e., counsel stipulated, and both the trial and appellate courts found, that respondent's goods were damaged by sea water while being carried on deck (17a).

(b) The dissenting opinion announces the novel proposition that "each container as a unit is the package to which the $500 limitation should be applied" (37a), citing as authority, Standard Electrica, S.A. v. Hamburg etc., 375 F. 2d 943 (2 Cir.),

cert. den. 389 U. S. 831 (1967). That case involved neither a container nor the issue of deviation.[21]

(c) The dissenting judge concluded that the parties intended each container to be a "package" because the shipments were described in the bill of lading as, e.g.: "(1) One metal container No. UCC—5530 said to contain: 536 ctns. bound books", citing as sole authority, Standard Electrica S.A. v. Hamburg, etc., supra (375 F. 2d 943) (2 Cir. 1967) (37a-38a).

Strangely, the foregoing view is in conflict with that expressed by the dissenting judge as a majority judge in the *Standard Electrica* case, *supra*.

The majority opinion in the *Standard Electrica* case states that where a shipper describes his goods as did the respondent herein:

> "we think such characterizations are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a 'package' and those characterizations further reflect the meaning given that term by the custom and usage of the trade." (375 F. 2d at p. 946.)

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[21] No American court has yet decided the question of whether a container and its cargo is a "package" under COGSA's §4(5). The French Court of Cassation has ruled that a container is not a "package" (Societe Navale Caennaise v. Gastin (Droit Maritime Francais, 1965: 18) (cf. Perregaux v. Lignes Franco-Marocaines Veerhaven (Droit Maritime Francais, 1958: 52); Cunard Steamship Co. Ltd. v. Department of Customs (Droit Maritime Francais, 1960: 46).

POINT VI

Sound public policy would seem to require that liability for the hazards of on deck stowage continue to be imposed on willfully deviating shipowners, rather than on innocent cargo owners. Certainly, the opposite result should not be reached without a clear and compelling indication that such was the intent of Congress.

Petitioners urge that COGSA has disregarded the historical background and above internationally recognized rule of maritime law by abolishing the carrier's status of an insurer and substituting in lieu thereof the same limited liability under Section 4(5) of the Act as governs the liability of a non-deviating carrier.

In *Atlantic Mutual* v. *Poseidon, supra,* the appellate court adopted the statement of the District Court that it "is sufficiently clear and unmistakable" that the language of COGSA "constitutes a change of existing law" as to a carrier's liability in the event of a deviation (313 F. 2d at p. 875). It is submitted that that conclusion is manifestly incorrect.

As appears in COGSA's Section 4(4),[22] there is no indication of an intention to change the established common law rule as to the consequence of a deviation on a carrier's liability. That section merely declares certain types of deviation to be justifiable and, at the same time, declaring certain acts to be *prima facie* unreasonable deviations.

The significant weakness of the Atlantic Mutual decision is the inequitable result reached by enforcing the Act where there has been an unreasonable deviation.

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[22] 46 U. S. C. Sec. 1304(4). See text of Section 4(4) at page 12 supra.

Should this be the ultimate judicial determination, the courts will be in the position of coming to the aid of a wrongdoer at the expense of an innocent party.

It is, we submit, clear that Congress intended to preserve the concept of deviation in specifying the minimum standards of the carrier's liabilities. It is also clear that Congress would not have expressly preserved the legal concept of deviation and, in the following section of COGSA, abolish the principal characteristic of deviation, i.e., unlimited liability. Since Section 4(4) provides that a reasonable deviation is not to be construed as a breach of the Act, it is logical to infer that an unreasonable deviation does breach the statute and render the $500 limitation clause inoperative.

The Court in *Atlantic Mutual* v. *Poseidon, supra,* in ruling that COGSA has changed the long established rule as to the effect of an unreasonable deviation, overlooked this inconsistency in its interpretation of the Act; it also reached that conclusion in disregard of a further cardinal canon of statutory interpretation, i.e., that statutes in derogation of common law are to be strictly construed (82 C. J. S. Sec. 393), particularly contracts exempting carriers from liability for negligence (*Caterpillar Overseas S.A.* v. *S.S. Expeditor,* 318 F. 2d 720, 722 (2 Cir. 1963) cert. denied, 375 U. S. 942 (1963); *Boston Metals Co.* v. *Winding Gulf,* 349 U. S. 122, 123 (1955); *Bisso* v. *Inland Waterways Corp.,* 349 U. S. 85, 90 (1955)).

In *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952), this Court said:

> "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

That principle was applied to COGSA in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 304-305 (1959).

The questions presented by the petition are essentially narrow and not of substantial public interest of such complexity or importance that the aid of this Court is properly invoked. All that is involved is the validity of an unusual bill of lading clause, and the effect of a willful deviation upon an ocean carrier's claim to the benefit of COGSA's $500 limitation—a statutory provision in derogation of petitioners common law liability for respondent's loss of $172,200.

Conclusion

The questions presented were correctly decided by the court below. Moreover, as is indicated by this Court's denial of petitions for writs of certiorari in three recent cases,[23] concerning on-deck stowage and its effect upon willfully deviating shipowners, the instant questions are not of sufficient importance to merit this Court's attention.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

F. Herbert Prem,
Counsel for Respondent,
Encyclopaedia Britannica, Inc.

Dated: February 16, 1970

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[23] Francosteel Corp. v. N. V. Nederlandsch, etc., 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. denied, 389 U. S. 931 (1967);

Searoad Shipping Co. et al. v. E. I. duPont de Nemours & Co., Inc., 361 F. 2d 833 (5th Cir.); cert. denied, 385 U. S. 973 (1966);

Atlantic Mutual Ins. Co. v. Poseidon, etc., 313 F. 2d 872 (7th Cir.); cert. denied, 375 U. S. 819 (1963).

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1126

UNIVERSAL MARINE CORPORATION, and S.S. "HONG KONG PRODUCER", her engines, etc.,

Petitioners,

vs.

ENCYCLOPAEDIA BRITANNICA, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The arguments set forth in Respondent's Brief in Opposition are unrelated to the controlling factors determinative of whether a writ of certiorari is warranted in the present matter.

Petitioners' First Reason for Granting the Writ

The "first reason" proposed by Petitioners for granting the Writ is that the decision of the Court of Appeals for the Second Circuit below conflicts with the decision of the Court of Appeals for the Seventh Circuit as to the interpretation of 46 USC § 1304(5) (Petition, p. 7). Respondent's objections thereto are set forth in Points II, III, IV, V and VI of its brief. The "Points" in question are nothing more than a marshalling of Respondent's arguments in

support of the holding of the Court of Appeals for the Second Circuit. They do not dispose of the grounds upon which the Writ is here sought, namely the sharp conflict between the Courts of Appeals for the Second Circuit and Seventh Circuit in the interpretation of important federal legislation to the maritime industry.

In Respondent's Point II (Respondent's Brief, pages 8-11), it is argued that after the passage of COGSA, the "decided weight of authority" holds "an unreasonable deviation not only deprives carriers of all exemptions and limitations in bills of lading, but also those provided by statute" (page 8).

As to "exemptions and limitation in bills of lading", COGSA represents a *statutory* compromise between cargo and carrier interests. The Act changes the law from what it was prior to the Act and provides a complete set of statutory rights and liabilities non-existent under the Harter Act, 46 U.S.C. 190 *et seq.*, or any other prior legislation. Accordingly, cases holding that deviation deprives a carrier of *contractual* exemptions or limitations do not apply to cases arising under the Act. Under the Carriage of Goods By Sea Act the question is not whether the carrier can take the benefit of *contractual* exceptions in the bill of lading. The question is statutory, and accordingly, the issue is not whether the court will enforce the terms of the bill of lading contract but what the express *statutory* provision of the Carriage of Goods By Sea Act is.

The "decided weight of authority" has *not* deprived carrier's of "exceptions and limitations . . . provided by statute", but on the contrary, has given effect to the unequivocal language "in any event" in applying the COGSA time limitation to sue and the limitation of liability, a deviation notwithstanding.

In *Nassau Glass Company* v. *Noel Roberts Ltd. and M/V Noel Roberts,* (S.D. Fla. 1965), 249 F.Supp. 116 the

court considered a deviation, involving on-deck stowage without notation on the bill of lading, as it affected the liability limitation, and stated at page 117:

> "The statute appears plain that liability is limited to $500 in all cases in which the bill of lading is silent as to the value of the cargo and this applies *'in any event'* and to *'any loss or damage'*." (Emphasis added.)

In *Potter* v. *North German Lloyd* (D.C. Cal., 1954), 50 F. Supp. 173 the court considered the effect of a deviation, consisting of the abandonment of a voyage, on the Carriage of Goods By Sea Act time limitation (Section 3[6]). The court stated at page 173:

> "If however the one-year time limit for bringing suit provided in the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1303(6), applies to this case, the decision of it will be necessarily controlled by such statutory time limit with the result that plaintiff's action will be defeated whether the question as to deviation and its related questions are decided in plaintiff's favor or not.
>
> There can be no question but that the courts of this country, as required by 46 U.S.C.A. § 1300, have been applying to carriage contracts for ocean shipments in foreign trade to and from American ports the Carriage of Goods By Sea Act, supra, and Section 1303(6) thereof which in material part provides that: *'In any event* the carrier and the ship shall be discharged from all liabilitiy in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *'."
>
> * * *
>
> "There seems no escape from defendant's seventh affirmative defense contained in its answer filed July 29, 1941, that plaintiff's suit was not brought within the one-year time provided in the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1303(6), and that plaintiff's action is barred by that statutory time limitation." (Emphasis added.)

In *Singer Hosiery Mills* v. *Cunard White Star* (1951), 199 Misc. 389, 102 N.Y.S. 2d 762, the court considered the effect of a deviation, involving the over-carriage of goods, on the COGSA time limitation, and stated at 102 N.Y.S. 2d 765:

> ". . . the question of shipments by sea to or from ports of the United States is a matter of Federal regulation, more especially so when the shipment is governed by a bill of lading. The Carriage of Goods By Sea Act (U.S. Code, tit. 46, § 1300 et seq.) regulates the rights and obligations of the carrier and the shipper in the instances and in the particulars provided for in the Act. Sec. 1303(6) provides:
>
> * * *
>
> 'This provision of the Act is all inclusive; it is of the substance of the rights between the parties. Granting that a breach has occurred and even assuming that the provisions of the bill of lading have been nullified and the carrier has become an insurer, under our Federal law which governs this action, the shipper, unless he has in some manner been relieved from the one-year limitation, is bound to begin the action for a breach within one year after delivery of the goods or when the goods should have been delivered.'"

It is stated in *United States* v. *Wessel, Duval & Co.* (SDNY, 1953), 115 F. Supp. 678, at page 684:

> "Those words '*in any event*' may well result in preserving this statutory limitation even though the ship has been guilty of a deviation." (Emphasis added.)

In *Poor on Charter Parties and Ocean Bills of Lading* (5th Ed., 1968), it is stated in Section 64 (p. 165):

> "It has sometimes been questioned whether this time limitation is applicable in cases of deviation. The decisions hold that it is, and this is sustainable on two grounds: (1) a statute is not displaced by a deviation, (2) the paragraph commences with the

> words *'in any event'*, indicating that the statutory bar applies no matter what has happened.'' (Emphasis added.)

The ''decided weight of authority'' to which respondent refers consists of *Searoad Shipping Co.* v. *E. I. DuPont de Nemours & Co.*, 361 F.2d 833 (5th Cir., 1966), cert. den. 385 U.S. 973, and *Francosteel Corp.* v. *N. B. Nederlandsch*, 249 Cal. App. 2d 880; 57 Cal. Reptr. 867; cert. den. 389 U.S. 931 (1967).

Francosteel Corp. v. *N. V. Nederlandsch Amerikaansche, S. M.* does not involve a conflicting decision of another Circuit. In that case, the Court states as its ''Conclusion'', that no precedent had been found on the issues then before the Court. The Court stated ''No determinative precedents on the scope of the one-year limitation have been found in either the cases construing Section 3(6) or those dealing with other provisions of the Hague Rules''. In referring to the Seventh Circuit Case in conflict with the decision below in the present matter, the Court states, as dicta (quoted by Respondent at page 10 of its Brief):

> ''From the foregoing cases it appears that defendant's reliance on Poseidon resembles a sand castle in danger of engulfment from a rising tide of contrary opinion.''

The *Poseidon* Case was decided in 1963, and the ''foregoing cases'' consist principally of decisions preceding the *Poseidon* Case, including some preceding COGSA. The ''rising tide of contrary opinion'' consists of a Temple L.Q. note (36 Temple L.Q. 222), and a 1954 U. of Pa. L. Rw. note (102 U. of Pa. L. Rw. 797).

Plaintiff places particular reliance on *Searoad Shipping Company* v. *E. I. duPont de Nemours and Company, supra.* In that case, the consideration of the Court was directed, not to the effect of the statutory limitation of liability, but to defenses asserted by the carrier as a basis for avoiding

liability. The limitation of liability provisions of COGSA were no issue; the cargo "consisted of 800 cases High Explosives—Dynamite and 50 cases Cordeau Detonant Fuse (primacord)" (361 F.2d 834, n. 2). On the basis of the COGSA $500 per package limitation, the loss would have to exceed $425,000 before the applicability of the statutory package limitation became a factor. The decision is directed to two contentions, asserted by the carrier, on the issue of whether there was, in fact, a deviation (361 F.2d 833, 834). The Court found against the shipowner on both issues, and concluded:

> ". . . we have no doubt that the insurer liability continues after COGSA (9) to flow from on deck deviation when the damage is causally related", (Pages 835, 836).

The Court does not proceed to the next step, which is the issue in the present matter, as to the effect of the COGSA statutory limit on such liability—it was unnecessary, since no question of statutory limitation was involved. This would explain why the Court saw no need to mention the earlier decision in the same Southern District of Florida, of *Nassau Glass Co.* v. *Noel Roberts Ltd. and M/V Noel Roberts* (*supra*), holding liability was limited under COGSA, even assuming an unreasonable deviation from on-deck stowage.

The *Searoad Shipping* Case is authority for the proposition that a deviation makes the carrier an insurer, and nothing more. The Court then had no need to consider the effect of the COGSA limitations under such circumstances. The same does not hold true in the *Poseidon* Case, where, in the opinion of the District Court affirmed by the Court of Appeals, it is stated at 206 F. Supp. 19:

> "Although a 'deviation' strips a ship of all excuses in her charter party and imposes upon her at least the liability of a common carrier, which is the liability of an insurer, Farr v. Hain S.S. Company,

> 2 Cir., 121 F.2d 940 (1941), the clear words of 46 U.S.C.A. § 1304(5), will serve to limit this liability to $500 per package where value has not been declared".

It is submitted here, as in the *Poseidon* Case, there is the further issue of determining whether, assuming the carrier *has* become an "insurer", the statutory limitations of COGSA apply. It is further submitted, on the authority of the cases cited above, the statutory COGSA limitation applies notwithstanding a deviation.

Further, the Court, in the *Searoad Shipping Case,* did not consider the application of the COGSA *statutory* provisions on the limitation of liability, but rather, the *contractual* incorporation of COGSA in the bill of lading. The Court notes, at page 835, n. 4, "The bills of lading contained the COGSA Clause Paramount, 46 U.S.C.A." Footnote 9, in the Court's conclusion quoted above, cites *Knauth, Ocean Bills of Lading,* 260 (1953):

> "It has become well settled that stowage of cargo on deck . . . is such a fundamental breach of the contract of carriage as to *displace the contract clauses* which might benefit the carrier . . ." (Emphasis added.)

It is Petitioners' position that the COGSA statutory provisions apply, without reference to contractual exceptions, and for this further reason, the *Searoad Shipping Case* has no bearing on the present matter.

In Respondent's Point III, the contention is reiterated that "COGSA made no change in the law of ocean carriage as to the effect of an unreasonable deviation upon a carrier's liability" (Respondent's Brief, page 11), and Respondent asserts that "COGSA's only reference to deviation is in § 1304(4)". However, here again, this argument relates to an aspect wherein the conflict between the opinions of the circuits is sharply defined. The opinion of the

Seventh Circuit in the *Poseidon Case,* finds support for its conclusion in the very "reference" noted by Respondent, stating at 313 F.2d 874-875:

> "In addition to the reasons stated by the district court, our conclusion finds support in the fact that the package limitation immediately follows § 4(4) of the Act, 46 U.S.C.A. § 1304(4) in which Congress, as we have already stated, recognized the carrier's liability for unreasonable deviations. It is difficult for us to believe that Congress did not intend this limitation to apply to the section next preceding it. (313 F.2d at pp. 874-875)."

In like manner, Respondent's Point IV (Respondent's Brief, page 15) is directed to the contention that "the legislative history, as well as the text of COGSA, establish that the intention of the legislators was to increase the carrier's liability and particularly that they intended that the $500 limitation did not apply in a case of deviation not excusable under COGSA § 4". Respondent's contention again only serves to emphasize the sharp conflict on the question. In the District Court decision affirmed by the Circuit Court, in *Atlantic Mutual* v. *Poseidon, supra,* it was stated, as to "legislative intent", at 206 F. Supp. 19:

> "It appears from a reading of the statute in its entirety, and from the records of hearings before the Senate Committee on Commerce on Senate Bill 1152, 74th Congress, First Session (1935), Page 47, that the doctrine of 'unjustifiable deviation' was not only reaffirmed, but expanded to apply to all breaches of obligation upon notice. For the purpose of applying this statute, I am unable to categorize liabilities into two classes, in the face of the express and clear language of the statute: those resulting from 'unjustifiable deviations' and those resulting from other breaches of obligation. Admiralty in its inherent differences of setting from the rest of our body of law has never intended to confine to itself the authority to resist clear statutory direction, good law, good reasoning and clear legislative intent, by virtue of

traditions which justifiably preserve it as a 'different' body of law.

In balancing the rights and liabilities of carriers and shippers, Congress clearly expanded the law to impose upon carriers full damage liability; but to impose upon shippers the responsibility of due notice. Under the Act, the carrier, if it has been given notice of the nature and value of the goods, may not assert any limitations of liability, contractual or statutory but it may adjust its shipping rates and its exercise of special care to reflect its own increased risk. On the other hand, if there is no notice, its liability will extend on the actual value of the goods carried, up to $500 a package, any lesser contractual limitation to the contrary notwithstanding.

Although a 'deviation' strips a ship of all excuses in her charter party and imposes upon her at least the liability of a common carrier, which is the liability of an insurer, Farr v. Hain S.S. Company, 2 Cir., 121 F.2d 940 (1941), the clear words of 46 U.S.C.A. § 1304(5), will serve to limit this liability to $500 per package where the value has not been declared. In the case at bar, the acceptance of the goods from the Libellant after the contemplated date of delivery by the shipper did not constitute a waiver of the breach of contract, though it did serve to reduce the measure of the consignee's damages."

In its Point V, Respondent sees a certain consistency in those opinions contrary to its contentions. As to the Court of Appeals for the Seventh Circuit, "There is no suggestion in the Appellate Court's opinion of independent legal research of the issue of law presented" (page 17), and as to the dissenting opinion in the Court below, "The dearth of authority and absence of analysis in the dissenting opinion also suggests an en passant consideration of the issues. . . ." (page 19). However, the opinion of the majority judges in the Court below, on the question here under consideration as to the effect of a deviation on the COGSA statutory limitation of liability, reads as follows:

> "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation. It is not disputed that the damage of the cargo was caused by sea water to which it was exposed by being stowed on deck. The carrier is liable for the full amount of damages sustained without benefit of the $500 limitation per package of COGSA. *Jones* v. *The Flying Clipper,* 116 F.Supp. 386 (S.D.N.Y. 1953)." (Page 33a.)

In its Point VI, Respondent contends "sound public policy would seem to require that liability for the hazards of on-deck stowage continued to be imposed on wilfully deviating shipowners rather than on innocent cargo owners," and that "the opposite result should not be reached without a clear and compelling indication that such was the intent of Congress", (page 21).

Without attempting to explore the statutory protections and conditions available to "innocent cargo owners", the fact of the matter remains that, as heretofore noted, the circuits are in conflict as to what is "the intent of Congress", and it is precisely for that reason that a Writ is warranted. The denial by this Court of Petitions for Writs of Certiorari in the cases referred to by respondent (Respondent's Brief, page 23), should not be controlling. As heretofore noted, the *Searoad Shipping Case* is not in point, and the *Francosteel Corp.* and *Atlantic Mutual Cases* involved no conflict between circuits. Here, as appears in the Petition for a Writ of Certiorari, there is a sharply defined conflict of authority between the Court of Appeals for the Second Circuit and the Court of Appeals for the Seventh Circuit.

Petitioners' Second Reason for Granting the Writ

Petitioner asserts the holding of the Court below, that the bill of lading provisions permitting on-deck stowage violates the Carriage of Goods by Sea Act, § 46 USC 1303(8), is based on propositions in direct conflict with the decisions of other Courts of Appeals.

Respondent's argument as to this (Respondent's Brief, Point I), again consists of contentions in support of the conclusion reached by the Court below. It does not achieve any conciliation of the decisions of other Circuits, which are noted in the Petition for a Writ of Certiorari submitted herein, and which are in conflict with the reasoning of the Court below.

CONCLUSION

Respondent's Brief in opposition does not, and cannot, explain or resolve the sharp conflict between the Circuits on the important issues here involving federal legislation. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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